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in the

Supreme Court

of the

United States

PATRICK M. TRAPPER, NUNZIO JAMES LOMBARDO, DENNIS LOMBARDO, VINCENT SERGE LORUSSO, CLARK WILLIAM OLDENBROOK,

Petitioners,

vs.

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS, SECOND DISTRICT

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QUESTIONS PRESENTED

1. WHETHER, CONSISTENT WITH THE FOURTH AMENDMENT, A LAW ENFORCEMENT OFFICER MAY LAWFULLY STOP A VEHICLE AND DETAIN ITS DRIVER IN THE ABSENCE OF A REASONABLE SUSPICION BASED ON OBJECTIVE, ARTICULABLE FACTS, THAT THE INDIVIDUAL IS INVOLVED IN CRIMINAL ACTIVITY.

2. WHETHER A SEARCH WARRANT MAY PROPERLY ISSUE UNDER THE FOURTH AMENDMENT WHEN THE AFFIDAVIT IN SUPPORT OF THE WARRANT IS BASED UPON ILLEGALLY SEIZED EVIDENCE AND WHICH, IN ADDITION, FAILS TO SET FORTH SUFFICIENT FACTS TO ESTABLISH PROBABLE CAUSE.

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CITATION TO THE OPINION BELOW

The opinion of the North Carolina Court of Appeals, Second District, is reported at 48 N.C. App. 481, 269 S.E.2d 680 (1980). (A. 1).[1]

JURISDICTION

The Judgment of the North Carolina Court of Appeals, Second District, was entered on September 2, 1980, affirming the Trial Court's denial of Petitioners' Motion to Suppress. (A. 1). On November 14, 1980, the Supreme Court of North Carolina entered its Judgment Dismissing Appeal on Motion of Attorney General. (A. 11). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The case, *sub judice*, involves Petitioners' rights to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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[1]The symbol "A." refers to the Appendix attached hereto.

STATEMENT OF THE CASE

On February 6, 1979, Petitioners were indicted in Hyde County, in the State of North Carolina, for various offenses related to the possession, sale and delivery of marijuana.

Prior to trial, Motions to Suppress were filed on behalf of each of the Petitioners. These Motions alleged, *inter alia*, that the evidence sought to be introduced against Petitioners by the State of North Carolina at trial was seized from Petitioners in violation of rights guaranteed to them by the Fourth Amendment to the Constitution of the United States. The Motions to Suppress were consolidated and heard on July 2-3, 1979, in the General Court of Justice, Superior Court Division.

Testimony adduced during the hearing on the Motions to Suppress revealed that in the early morning hours of January 14, 1979, a Ford truck with a camper shell, being driven by Petitioner Trapper, had left the property owned by Petitioner Nunzio Lombardo, and was stopped by Deputy Sheriff Charlie Carrowan of the Hyde County Sheriff's Department. A subsequent search of the truck, following the procurement of a search warrant, disclosed forty (40) bales of marijuana therein.

As a result of the search of the truck, a second search warrant was obtained, and additional bales of marijuana were discovered in a tin shed on the property owned by Petitioner Nunzio Lombardo. Petitioners Nunzio Lombardo, Dennis Lombardo, Vincent Lorusso and Clark

Oldenbrook were arrested upon the execution of the second search warrant.

The first witness for the State of North Carolina at the hearing on the Motions to Suppress was Deputy Sheriff Carrowan. Deputy Carrowan testified that he first met Petitioner Nunzio Lombardo one-and-a-half to two years prior to January 14, 1979, the date of the incident in question. At that time, Carrowan had a conversation with Petitioner Nunzio Lombardo with respect to the property involved in this case, which at that time Lombardo was in the process of purchasing. From that time up until the arrest of Lombardo, the two spoke very infrequently. (MST. 10-12, 67).[2]

The Lombardo property was located off a rural paved road. An unpaved rock road was put in to connect this rural paved road with the structures on the Lombardo property. (MST. 15). Although the structures on the Lombardo premises were not plainly visible from the road, Carrowan was aware of the fact that there were two structures. (MST. 101-102).

Approximately six weeks before January 14, 1979, Carrowan began to take notice of complaints from neighbors of the Lombardo property of boat noises and truck noises in the vicinity. (MST. 15, 68, A. 28-29, 40-41). Although several men resided in the area, Carrowan indicated that most of the complaints came from women. (MST. 75-76). Carrowan indicated that his own suspicions were aroused by the presence of out-of-state vehicles in the area, the locked metal gate across the entrance to the premises, the fact that Lombardo

[2]The symbol "MST." refers to the Motion to Suppress transcript.

had little in common with any law enforcement officers in Hyde County (even though he had previously indicated to Carrowan that he was a retired New York City police officer), and that the place ". . . was better than private." (MST. 69-70, 11, A. 40-42, 28).

Carrowan testified that on two occasions subsequent to the purchase of the property by Petitioner Nunzio Lombardo, he had gone on the property, at least once with his wife, because ". . . we were interested in what was going on in the community." (MST. 97-98).

On December 21, 1978, Carrowan received a telephone call asking him to go to Fortiscue Creek to provide assistance to a boat which was aground. Fortiscue Creek runs past the Lombardo premises. (MST. 16). A fifty-seven (57) foot shallow draft vessel named the "Lady Barbara" had run aground approximately one mile from the Lombardo premises. (MST. 17, 123). Carrowan spoke with an individual located on the "Lady Barbara" and received what he considered to be an unsatisfactory explanation as to how the boat became situated and immobilized in Fortiscue Creek. In view of the size of the boat, Carrowan arranged for the Coast Guard to come and tow it. (MST. 20-21). On cross-examination, Carrowan admitted that he had not seen any of the Petitioners on the "Lady Barbara", nor did he detect any illegal activity on or about the boat. (MST. 72-73, A. 43). At no point in his testimony did Carrowan establish any connection whatsoever between the events surrounding the "Lady Barbara" on December 21, 1978 and the Lombardo premises located a mile away.

Other than having met Petitioner Nunzio Lombardo in the manner set forth above, Carrowan had not met any of the other Petitioners herein, had no prior knowledge of any possible illegal activities being carried on by them and, in fact, ". . . as far as [he] was concerned, they didn't exist until the morning we raided the place." (MST. 71).

After the "Lady Barbara" incident, Carrowan became "very suspicious" with respect to the Lombardo premises. (MST. 68, A. 41). He testified that, as a result of that incident, he was *certain* that "in [his] mind" the Lombardo property was being used to store or transport marijuana. (MST. 95, A. 46). Although he ". . . had been kind of keeping watch on the place . . ." he deemed it necessary at this point to surveil the property further. (MST. 68, 23, A. 41, 30). Since he was unable to observe the property from beyond the gate across the driveway, he disguised himself, and attempted to observe the premises in his homemade boat from the water. (MST. 22-23, A. 29-30). He had concluded ". . . in [his] mind that there was something going on that should not be in this area." (MST. 23-24, A. 30). According to Carrowan, in the course of this surveillance, two shots were fired at him from the vicinity of the Lombardo premises. (MST. 24). He left and made no further effort to investigate the alleged shooting incident. (MST. 25, 115-116, A. 31-32, 49-50).

Carrowan next began to surveil the property from the roadside. (MST. 26, A. 32). He noticed tire tracks leading into and out of the Lombardo property, and considered the amount of traffic to be abnormal. (MST. 28). However, he did not observe any illegal activity with respect to this traffic. (MST. 69).

Advance preparations were then made to surveil a vehicle leaving the Lombardo premises, should the opportunity arise. Pre-arranged false radio signals were devised between Carrowan, Trooper Darrell Bass of the State Highway Patrol, and Deputy Sheriff Melvin Collins. (MST. 37, 66, 104-105). A pre-arranged plan as to vehicle positioning was also devised by the three officers. (MST. 102-103). The false radio signals were created due to the unfounded concern on the part of Carrowan that should their stopping of a vehicle be detected, the occupants of the Lombardo property might set fire to the structures, thus preventing the police from conducting a search thereof. (MST. 37, 119, A. 34, 50-51).

On January 13, 1979, Deputy Carrowan finally received his opportunity to surveil a vehicle in the vicinity of the Lombardo premises, and put his contingency plan into effect. (MST. 28, 82, A. 32, 43-44). At about 5:30 P.M. on that date, Carrowan had received a telephone call from an "informant" (a neighbor in the community) that a ". . . truck or rig had gone into Lombardo's place." (MST. 31, 82). This was the first time that Carrowan had the opportunity to surveil the property while a truck was still there. (MST. 82-83, A. 44-45). He arrived at approximately 6:30 P.M. on that date, and secreted himself beyond the gate to the Lombardo property. (MST. 32). At approximately 9:30 P.M., he left his position just long enough to exchange his patrol car for his personal vehicle. (MST. 32-33). Bass and Collins were notified to be on the alert for radio communications and to be in their pre-arranged locations. (MST. 84, 102, A. 45, 46-47).

During the 5:30 P.M. telephone conversation, the neighbor had described the vehicle as "[a] Ford truck with camper [sic] body on it." (MST. 34). At approximately midnight, Carrowan observed lights and heard a motor indicating a vehicle coming from the Lombardo premises. (MST. 33). Carrowan first saw "clearance lights" across the top of the vehicle, which he knew to be located on campers and trucks. Next, he saw the headlights. (MST. 33-34). Although he was not familiar with this truck, Carrowan testified that "[i]t was travelling far to [sic] slow for the rate the motor was turning." (MST. 34, A. 33).

Carrowan testified that it was approximately two hundred yards from the structures on the Lombardo property to the intersection of the Lombardo driveway with the rural paved road. (MST. 100). When the vehicle was approximately "half way out" Carrowan had completed his observations and determined that he would have to leave quickly and get his patrol car ". . . because [he] had no blue light on [his] personal car." (MST. 35, A. 33).

In addition to his need to secure his patrol car, there is absolutely no doubt that Carrowan intended to stop the vehicle on the basis of the observations set forth above. Significantly, when asked if he intended to stop the vehicle, Carrowan replied: "Yes, if I could find a reason." (MST. 84-85, A. 45-46). When asked if he intended to conduct a search of the truck, Carrowan replied: "If I had further reason to search this truck such as if he denied me the privilege to look or anything else that he had to hide, anything that would give me any idea that he had something to hide, yes, I intended to search it." (MST. 84, A. 45-46).

Carrowan left the vicinity in advance of the truck, exchanged vehicles, and began to follow the truck along the rural paved road and finally, west on U.S. Route 264. (MST. 36-37). Bass and Collins were notified. (MST. 37-38).

Carrowan followed the truck (which subsequently turned out to be driven by Petitioner Trapper) for approximately sixteen (16) miles. (MST. 106, A. 47-48). During that time, he did not observe the driver of the vehicle violate any motor vehicle law. (MST. 107, A. 48). Significantly, Carrowan stopped the vehicle " . . . within one mile of the county line . . . " . (MST. 106, A. 48).

When Carrowan stopped Trapper's vehicle, Deputy Collins, who had been following Carrowan, pulled directly behind Carrowan's vehicle. (MST. 39, 147). The two police officers were joined by Trooper Bass some minutes later. (MST. 40, 130). Carrowan approached the vehicle and asked Petitioner Trapper for a driver's license. (MST. 40, A. 35). There were no problems with his license. (MST. 109, A. 48-49). Carrowan then informed Trapper that authorities in the area had been having problems with people taking furniture from old houses and asked to look inside the camper. (MST. 41, A. 35). However, he indicated that he did not suspect Trapper of having stolen furniture. (MST. 60, A. 38). Carrowan also testified that some time during the evening he may have mentioned that he was concerned about illegal aliens, but was not certain. (MST. 61). In any event, according to Carrowan, when asked, Trapper told Carrowan that he (Trapper) did not have a key to the camper door. (MST. 41).

Next, Carrowan asked for, and received, a registration card for the vehicle. (MST. 41, 109, A. 36, 49). By this time, Trooper Bass had arrived on the scene and was given the vehicle registration card to "check out". (MST. 41, 56, A. 36, 37). Trooper Bass then went back to his vehicle, checked the registration, found it to be valid, and returned it to Deputy Carrowan. (MST. 57, 124, A. 37-38, 51).

After he had returned the registration to Deputy Carrowan, Trooper Bass testified that he went to the right hand or passenger side of the camper " . . . and stood there a few minutes." (MST. 125, A. 51). Bass testified that at this time, he walked around the vehicle "about four times", during which time he smelled what he thought to be marijuana. (MST. 133-134). At this point, Bass approached Carrowan and informed him of his suspicions. (MST. 125, 57).

Deputy Collins confirmed previous testimony that following the completion of the license and registration check, and up until the discovery of the odor of marijuana, Trapper was " . . . held . . . there for some period of time . . ." and " . . . was not free to leave . . .". (MST. 154-155, A. 51-52).

Following the discovery of what was thought to be the odor of marijuana, Trapper was placed under arrest and Deputy Collins was sent to get a search warrant for the vehicle. (MST. 45, 47, A. 36, 37). Trapper was placed in the police vehicle, and his truck was taken into custody by the police. (MST. 62-63, A. 39-40).

Deputy Collins testified that he met Mrs. Lenora Bright, Assistant Clerk of the Superior Court in Hyde

County, for the purpose of securing a search warrant. (MST. 155). Collins was the affiant for the warrant, which was typed by Mrs. Bright on the basis of information provided by him. (MST. 155-159). The affidavit in support of the warrant which was subsequently issued by Mrs. Bright stated as follows: "xxxxxxxxxx a strong odor or [sic] marijuana was noticed as xxxxxxxxxx a license check was being made on driver of said vehicle. Information was given in confidence and from a very reliable informant, also." (A. 24). With respect to the aforesaid Application, Collins indicated on cross-examination that he was not the individual who had received the confidential information from the reliable informant. (MST. 160, A 52).

Collins returned to the scene at approximately 1:40 A.M. with the Search Warrant. (MST. 54). Trapper had been placed under arrest prior to 1:00 A.M. (MST. 54). The Search Warrant was executed and several bales of marijuana were found inside the truck. (MST. 48).

Following this discovery, the officers returned to the Sheriff's Office in Swan Quarter for the purpose of obtaining a second Search Warrant for Petitioner Nunzio Lombardo's property. (MST. 50-51).

The Application for the second Search Warrant, for which Carrowan was the applicant, sought to search "a house trailer, double wide, white, owned by Nunzio J. Lumbreds [sic] . . . " (A. 27).

Lewis Young of the North Carolina State Bureau of Investigation testified that the second Search Warrant was served between 4:30 and 5:00 A.M. on January 14,

1979. (MST. 166). Young testified that the mobile home on the Lombardo premises was entered by the officers and the Warrant served and executed. (MST. 166). Petitioners Nunzio Lombardo, Dennis Lombardo, Vincent Serge Lorusso and Clark William Oldenbrook were found inside the mobile home. (MST. 52-53). Although no marijuana was found inside the mobile home, Young testified that he went out to the tin shed (which was not mentioned in the Warrant) because "[s]omeone came in and advised me that there's [sic] bales in the warehouse out back." (MST. 166, A. 52). Numerous bales of marijuana were found in the tin warehouse. (MST. 167).

During the course of the hearing on the Motion to Suppress, Petitioners Vincent Lorusso, Nunzio Lombardo, and Dennis Lombardo all testified and established their standing to contest the validity of the searches and seizures as set forth above. (MST. 235 *et. seq.*, 258 *et. seq.*, 279 *et seq.*).

At the conclusion of the hearing thereon, the Motion to Suppress was denied by the Court. (MST. 317). An Order denying the Motion to Suppress was filed by the Court on August 6, 1979. (A. 13).

The cases against Petitioners came on for trial on August 13, 1979 in the General Court of Justice, Superior Court Division of Hyde County. (AR. 2-3).[3] All Petitioners entered pleas to various charges, but appropriately preserved their right to appeal to the North Carolina Court of Appeals, Second District, for the purpose of

[3]The symbol "AR." refers to the Appellate Record filed in the North Carolina Court of Appeals, Second District.

obtaining review of the Trial Court's denial of their Motions to Suppress. (AR. 3-4).

On September 2, 1980, the North Carolina Court of Appeals, Second District, filed its Opinion affirming the Trial Court. (A. 1). Timely review of that Opinion was sought in the Supreme Court of North Carolina. However, on November 14, 1980, that Court entered its Judgment Dismissing Appeal on Motion of Attorney General. (A. 11).

REASONS FOR GRANTING THE WRIT

The administration of criminal justice in the application of the Fourth Amendment's exclusionary rule will be clarified by granting this Petition for Writ of Certiorari. Unless redressed, Petitioners will suffer irreparable, blatant violations of rights guaranteed them by the Fourth and Fourteenth Amendments to the United States Constitution. See *Stone v. Powell*, 428 U.S. 465 (1976). State Court application of the exlusionary rule ought to be consistent with this Court's decisions. Granting this Writ will enable this Court to clarify the need for uniformity of enforcement of Fourth Amendment principles in both rural and urban communities.

1. The stop of Petitioner Trapper's vehicle, and the detention of Petitioner Trapper, were illegal.

It is firmly established that vehicle stops, and subsequent "investigatory detentions" of the operators and occupants thereof, are entitled to the protection of the Fourth Amendment. In *Delaware v. Prouse*, 440 U.S. 648 (1979), this Court held that:

> The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-558, 96 S.Ct. 3074, 3082-3083, 49 L.Ed.2d 1116 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975); cf. *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968).

Id. at 653.

In recognition of the above, this Court concluded that:

> . . . except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Id. at 663.

In *Dunaway v. New York*, 442 U.S. 200 (1979), this Court recognized that the limited intrusions created by *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny were not intended to supplant or alter the " 'long

prevailing standards' of probable cause" associated with arrest. *Id.* at 208 quoting *Brinegar v. United States*, 388 U.S. 160, 176 (1949).

Most recently, in *Reid v. Georgia*, U.S. , 100 S.Ct. 2752 (1980), this Court definitively stated that:

> The Fourth and Fourteenth Amendments' prohibition of searches and seizures that are not supported by some objective justification governs all seizures of the person, "including seizures that involve only a brief detention short of traditional arrest. *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969); *Terry v. Ohio*, 392 U.S.1, 16-19, 88 S.Ct. 1868, 1877-1878, 20 L.Ed.2d 889 (1969)." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607. [footnote omitted]. While the Court has recognized that in some circumstances a person may be detained briefly, without probable cause to arrest him, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. See *Brown v. Texas*, 443 U.S. 57, 51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357; *Delaware v. Prouse*, 440 U.S. 648, 661, 99 S.Ct. 1391, 1400, 59 L.Ed.2d 660; *United States v. Brignoni-Ponce, supra; Adams v. Williams*, 407 U.S. 143, 146-149, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612; *Terry v. Ohio, supra.*
>
> *Id.* at , 100 S.Ct. at 2753.

In the instant case, the lack of a "reasonable and articulable suspicion" for the stop of the vehicle driven

by Petitioner Trapper is readily apparent. *Reid v. Georgia, supra.* Either standing alone, or considered collectively, the reasons advanced by Deputy Carrowan for the stopping of the vehicle, and the subsequent detention of Petitioner Trapper, fall far short of the "specific, objective facts" required. *Brown v. Texas,* 443 U.S. 47, 51 (1979), *Delaware v. Prouse, supra., Terry v. Ohio, supra.* Indeed, it is evident that the real basis for Deputy Carrowan's classic rural "[interest] in the community" (MST. 97-98) was because the Lombardo property was " . . . better than private." (MST. 69-70, A. 43). However, the boat and truck noises, the presence of out-of-state vehicles, the locked metal gate across the entrance to the premises, and the fact that Petitioner Nunzio Lombardo had little in common with the police officers of Hyde County, are insufficient,when measured objectively, to rise to the level of articulable suspicion. Carrowan himself testified that he saw nothing illegal with respect to the traffic in the vicinity of the Lombardo premises. (MST. 69). Ultimately, as Carrowan suggested on more than one occasion, the suspicions were "in [his] mind". (MST. 23-24, 95, A. 30, 46).

Moreover, not even the "Lady Barbara" incident, which made Deputy Carrowan "very suspicious", as well as "sure" that the Lombardo premises were being used to store or transport marijuana (MST. 68, 95, A. 41, 46), contribute to the paucity of objective facts available to support Carrowan's inferences. As noted previously, the "Lady Barbara" incident occurred approximately three-and-a-half weeks before the stop of Trapper's vehicle; the vessel was found approximately one mile from the Lombardo premises; and none of the Petitioners were present on or connected with the boat. (MST. 16, 17, 72). As Carrowan himself admitted,

neither he, nor the Coast Guard, had observed anything illegal occurring with respect to the "Lady Barbara", (MST. 73, A. 43). Finally, Carrowan agreed on cross-examination that the "Lady Barbara" was a shallow draft vessel, and as such notorious for its inability to bear weight. Ultimately, an objective analysis totally fails to support any connection whatsoever between the "Lady Barbara" and either the Trapper vehicle or the Lombardo premises.

Even if there was some objective justification for Carrowan's suspicions with respect to the Lombardo property, the mere entry onto, and exit from the premises by the vehicle driven by Trapper on January 13-14, 1979, fails to objectively support any reasonable suspicion that either Trapper or the vehicle were ". . . subject to seizure for violation of law . . .", *Delaware v. Prouse*, 440 U.S. at 663. Carrowan was not familiar either with Trapper or the vehicle he was driving. (MST. 71).

The record clearly reveals that Deputy Carrowan waited for the opportunity to execute his intention to stop *any* vehicle exiting the Lombardo premises. This is established by the pre-arranged radio signals and police vehicle positioning preparations made with Trooper Bass and Deputy Collins. Furthermore, Carrowan acted (significantly, to get a vehicle with a blue light) after having seen only the lights of the truck, which was still, according to his own testimony, approximately one hundred yards away from him. (MST. 35, 37, 66, 84, 100, 102-103, 104-105, A. 33-34, 45, 46-47). As Carrowan admitted, he intended in advance to stop this vehicle ". . . if [he] could find a reason." (MST. 84-85, A. 45-46). After sixteen miles of following the vehicle, with no violations of any North Carolina motor vehicle law

observed, it is apparent that Carrowan's "reason" appeared in the form of the fast approaching Beaufort County line. (MST. 106, 107, A. 47, 48).

Finally, Carrowan's professed concern about the stealing of furniture from old houses, admittedly a ruse insofar as Petitioner Trapper was concerned, is further indicative of the sham nature of the vehicle stop.

For the reasons set forth above, in upholding the validity of the stop and detention at issue herein, the Courts of North Carolina have failed to recognize and implement applicable Fourth Amendment standards, as articulated by this Court. Granting the relief sought will conform the decisions of the Courts below to the Federal Constitutional standards enunciated by this Court and accordingly, vindicate rights guaranteed Petitioners by the Fourth and Fourteenth Amendments to the United States Constitution.

2. The tainted and otherwise insufficient nature of the search warrants.

It is fundamental that ". . . evidence of criminal action may not, save in very limited and closely confined situations, be seized without a judicially issued search warrant." *Frank v. Maryland*, 359 U.S. 360, 365 (1959). See also *Arkansas v. Sanders*, 442 U.S. 753 (1979), *United States v. Chadwick*, 433 U.S. 1 (1977).

However, it is equally fundamental that the validity of search warrants themselves, as well as affidavits in support thereof, are subject to the requirements of the Fourth Amendment. In *Whitley v. Warden, Wyoming*

State Penitentiary, 401 U.S. 560, (1971), it was held that:

> The decisions of this Court concerning Fourth Amendment probable-cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant. [footnote omitted]. Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887 (1964); Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958). *Id.* at 564.

A. The vehicle warrant

The search warrant for the vehicle driven by Petitioner Trapper, and stopped by Deputy Carrowan, suffers from two fatal deficiencies: first, both the information used to supply the vehicle description and the facts set forth to establish probable cause, were a direct product of the illegal stop of the vehicle.[4] When purged of the information seized as a result of the illegal stop and seizure, the Application for Search

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[4]The Application for Search Warrant, which contains both the vehicle description, and the facts in support of probable cause, is reproduced at page 24 of the Appendix attached hereto.

Warrant is clearly insufficient to meet either the particularity requirement of the Fourth Amendment or the requirement that facts sufficient to establish probable cause be alleged. *cf. Franks v. Delaware*, 438 U.S. 154 (1978), *Wong Sun v. United States*, 371 U.S. 471 (1963), *Whiteley v. Warden, Wyoming State Penitentiary, supra.*

Second, and independent of the issue of the taint resulting from the illegal stop, the Application for Search Warrant (A. 24) clearly fails to provide ". . . sufficient information to support an independent judgment that probable cause exists for the warrant." *Whiteley v. Warden, Wyoming State Penitentiary, supra* at 564.[5] There is a complete dearth of "operative fact[s]" to ". . . support the independent judgment of a disinterested magistrate." *Id.*

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[5]A perusal of the facts in support of probable cause, while referring to "a strong odor or [sic] marijuana," fails to indicate that the odor was emanating from the truck (A. 24). Furthermore, whether or not such an odor did actually emanate from the vehicle, based on the physical condition of the truck, as well as the weather conditions existing at the time of the vehicle stop, was an issue hotly contested by Petitioners in the trial court. Although Deputy Carrowan, Trooper Bass, and Deputy Collins all testified at the hearing on the Motion to Suppress that they were able to smell marijuana (MST. 46, 125, 147-148), Agent Lewis Young of the State Bureau of Investigation, who arrived at the scene of the vehicle stop, and who had previously participated in a seizure of some 22 to 25 tons of marijuana, did not recall smelling an odor of marijuana about the truck on the evening in question. (MST. 192). Furthermore, at the hearing, Petitioners proffered expert testimony to the effect that, based on the physical condition of the camper, as well as the weather conditions existing on the evening in question, it would not have been possible to smell an odor of marijuana emanating from the truck. (MST. 286 *et seq.*, 299 *et seq.*).

Finally, insofar as the Application for Search Warrant indicates that "[i]nformation was given in confidence and from a very reliable informant, also [.]" (A. 24), the Affidavit clearly fails to comply with the requirements enunciated by this Court for the sufficiency of such "informant" information in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969).

B. The warrant for the Lombardo property

The search warrant subsequently obtained for the search of the Lombardo property suffers from many of the same constitutional deficiencies as the warrant for the vehicle.[6] First, the warrant for the Lombardo property

[6]The Application for the Search Warrant for the Lombardo property is reproduced at page 27 of the Appendix attached hereto. Although somewhat difficult to read, the facts purporting to establish probable cause in the second warrant are set forth as follows:

> That on 1-8-79 affiant was advised by a confidential source who had been watching the above described property entryway on RPR 1145. That on 1-8-79 this source observed a tractor-trailer truck enter the property. That on 1-8-79 source said they heard noises like large truck motor roaring and source also complained of boat motor noises and truck noises at night which kept source awake. That this property belongs to Nunzio J. Lumbards [sic] who told affiant on previous occasions that the property was for vacation and retirement. That on 12-21-78 affiant observed a 57 ft. pleasure boat from Wilmington, Delaware on Fortescue Creek approx. 1 mile from Lumbards [sic] property. Said boat was stuck in 2½ feet of water. That at 5:30 P.M. affiant saw Ford pickup truck with camper enter Lumbards [sic] property on 1-13-79. That said exited said property at 12:00 midnight 1-13-79. Said camper truck was stopped by affiant and search [sic] with warrant on 1-14-79 and found to contain

was fatally tainted by the prior illegal stop and search of the vehicle. In *Wong Sun v. United States*, 371 U.S. 471 (1963), this Court held that the test for determining whether or not illegally seized evidence is "fruit of the poisonous tree", thus subject to exclusion, is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." [citation omitted] *Id.* at 488.

In the instant case, there can be little doubt that vital aspects of the Affidavit in support of the second warrant were a direct and unequivocal result " . . . of the primary illegality . . . " . *Id.* Moreover, the record in this case clearly reflects that there is no attenuation between the illegally seized evidence, which served as the basis for both the vehicle and property search warrants, and the "fruits" resulting from the execution of the second warrant. See *Brown v. Illinois*, 422 U.S. 590 (1975). Accordingly, the arrest of Petitioners, being founded upon the fruits of an illegal search, cannot be sustained. *Wong Sun v. United States, supra.*

Purging the tainted information from the Affidavit in support of the second Search Warrant (i.e. "[s]aid camper truck was stopped by affiant and search [sic]

(Footnote 6 continued)

> approx. 25 bales of marijuana. That said source is reliable and is member in good standing in Hyde Co. and Scranton community. Source has given information in the past that has proven to be true and reliable. That said information has been checked out by affiant on 1-13-79 and was found true. Affiant has known source for 40 yrs.

with warrant on 1-14-79 and found to contain approx. 25 bales of marijuana"[.]) strips the Affidavit of sufficient facts to establish probable cause for the issuance of the search warrant. *Whitely v. Warden, Wyoming State Penitentiary, supra, Spinelli v. United States, supra., Aguilar v. Texas, supra.*

Thus, issuance of the Writ is necessary to remedy the violations of Petitioners' Constitutional rights.

CONCLUSION

We respectfully urge the Court, for all of the reasons set forth above, to grant a Writ of Certiorari and to reverse the decision below.

Respectfully submitted,

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Appendix

NO. 792SC1188

NORTH CAROLINA COURT OF APPEALS

Filed: 2 September 1980

Hyde County

STATE OF NORTH CAROLINA

v.

PATRICK M. TRAPPER
(79-CRS-38),
NUNZIO JAMES LOMBARDO
(79-CRS-107),
DENNIS LOMBARDO
(79-CRS-109),
VINCENT SERGE LORUSSO
(79-CRS-46),
and CLARK WILLIAM OLDENBROOK
(79-CRS-48)

Appeal by defendants from Strickland, Judge. Judgment entered 13 August 1979 in Superior Court, Hyde County. Heard in the Court of Appeals 25 April 1980.

The defendants were indicted for various crimes connected with the possession and sale of marijuana. Prior to trial the defendants made motions to suppress as evidence marijuana which had been confiscated after searches of a vehicle driven by the defendant Trapper and a building on property owned by the defendant

Nunzio Lombardo. A hearing on the motions to suppress was held before Judge Godwin. The evidence at the hearing showed that Charlie Carrowan is a Deputy Sheriff of Hyde County. Approximately two years prior to January 1979, the defendant Nunzio Lombardo purchased a tract of land approximately one-half mile from Mr. Carrowan's home. A housetrailer was placed on the property. Mr. Carrowan had some complaints from a neighbor about noises that sounded as if they came from boat motors and trucks in the area of Mr. Lombardo's property. On one occasion Mr. Carrowan arranged to have a 60-foot boat named the "Lady Barbara" towed from Fortiscue Creek which runs in front of the Lombardo property. The operator of the boat told Mr. Carrowan that it had been driven into the creek from the Pungo River by the wind. Based on his knowledge of the wind at the time the boat had run aground, Mr. Carrowan did not believe this was true. Mr. Carrowan then began a surveillance of the Lombardo property from the water. Several shots were fired in his direction which he believed came from the Lombardo property. After that, he began a surveillance of the Lombardo property from the land side. He considered the amount of traffic abnormal but he did not observe any illegal activity.

On 13 January 1979 Mr. Carrowan received information that a truck had entered the Lombardo property. He began a surveillance of the property at approximately 6:30 p.m. At approximately midnight, he saw clearance lights coming up the road on the Lombardo property to the highway. Mr. Carrowan followed the truck for some distance before stopping it. He testified, "As far as I could observe the driver of

this truck was not breaking any motor vehicle laws." He also testified, "As to whether it was my intent to conduct a search of this truck, if I had further reason to search this truck such as if he denied me the privilege to look or anything else that he had to hide, anything that would give me any idea he had something to hide, yes, I intended to search it."

The defendant Trapper was the driver of the truck and he gave Mr. Carrowan a proper driver's license and registration card. A few minutes after the truck was stopped, Deputy Sheriff Melvin Collins and Trooper Darrell Bass of the Highway Patrol, arrived to assist Mr. Carrowan. Approximately ten minutes had elapsed after the truck was stopped when Trooper Bass walked around the truck four times. He testified he smelled the odor of marijuana emanating from the passenger side of the truck. The other two officers then went to the passenger side and smelled the odor of marijuana. The defendant Trapper was placed under arrest and Deputy Sheriff Collins went to procure a search warrant. The affidavit for the search warrant made by Deputy Sheriff Collins contained the following statement:

> "The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: a strong odor or marihuana [sic] was noticed as a license check was being made on driver of said vehicle. Information was given in confidence and from a very reliable informant, also."

A search warrant was issued and a search of the truck revealed it contained several bales of marijuana.

A warrant was then procured to search the property of Nunzio Lombardo. During this search several bales of marijuana were found. Judge Godwin made findings of fact consistent with the evidence and overruled the motions to suppress. Each defendant pled guilty at a later term of court. All defendants appealed from the sentences imposed.

Attorney General Edmisten, by Assistant Attorney General Daniel F. McLawhorn, for the State.

Herman E. Gaskins, Jr., Joel Hirschhorn, and Smith, Patterson, Follin, Curtis, James and Harkavy, by Michael K. Curtis, for defendant appellants.

WEBB, Judge.

We note at the outset that our Supreme Court has recently held in State v. Reynolds, 298 N.C. 380, 259 S.E. 2d 843 (1979) that if a defendant intends to appeal from a ruling on a suppression motion after a plea of guilty, he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized or he will lose his right of appeal. The record is not clear in this case that any notice of intention to appeal was given the prosecutor or the court. We shall consider the appeal on its merits.

The defendants contend that we should reverse and order the evidence of the marijuana suppressed. They argue that the affidavit submitted to the magistrate to search the truck did not support the issuance of a search warrant for the truck; that if the affidavit did support the issuance of the search warrant for the

truck, the testimony at the hearing on the motions to suppress showed the evidence on which the affidavit was made was illegally obtained; the warrant to search the premises of Nunzio Lombardo was based on the invalid warrant to search the truck which makes it an invalid warrant; that even if the warrant to search the premises of Nunzio Lombardo was a good warrant, the officers exceeded the scope of the warrant in their search; and that the officers did not properly serve the warrant to search the premises.

In order for a magistrate to issue a search warrant, he must have evidence before him from which he can find probable cause that a crime has been committed and probable cause that evidence of the crime may be on the premises to be searched. *See* Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964). We hold that the affidavit in the case sub judice which contained the statement "a strong odor or marihuana [sic] was noticed as a license check was being made on driver of said vehicle" was evidence from which a magistrate could conclude that there was probable cause that the driver of the truck was in possession of marijuana and the marijuana might be found by a search of the truck. The word "or" was clearly a typographical error. The maker of the affidavit intended to use the word "of" in the context of the sentence. The defendants, relying on Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed. 2d 660 (1979) contend that the affidavit showed on its face that the evidence was illegally obtained since it stated the odor of marijuana was detected while a license check was being made. *Prouse* held that evidence of marijuana was unconstitutionally obtained when a patrolman made a random stop of a car because

he "wasn't answering any complaints." There was no reason to think the driver of the vehicle was violating any law at the time he was stopped. The United States Supreme Court held this intrusion violated the driver's Fourth and Fourteenth Amendment rights. The Supreme Court recognized that some driver's license checks are constitutionally permissible giving as one example a checkpoint operation in which all cars proceeding past a certain point are stopped. When the magistrate examined the affidavit in the case sub judice, it did not show what kind of driver's license check had been made. The affidavit did not show on its face that the driver's license check was improper. The magistrate did not err in issuing the warrant for a search of the truck.

The defendants' next contention is that the hearing before Judge Godwin showed that the evidence used to procure the search warrant for the truck was illegally obtained. They contend first that the odor of marijuana was not obtained under a plain view. *See* State v. Blackwelder, 34 N.C. App. 352, 238 S.E. 2d 190 (1977). We do not believe the plain view doctrine is dispositive of this case. The defendants also contend that Mr. Carrowan did not have a valid reason to stop the truck and if he did, the officer could not detain the truck after the driver's license and registration check had revealed nothing irregular.

The United States Supreme Court has in several cases passed on the question of detaining persons for investigation without probable cause to believe the persons have committed crimes. *See* Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed. 2d 824

(1979); Delaware v. Prouse, *supra;* United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed. 2d 607 (1975); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). We believe these cases hold that, consistent with the Fourth and Fourteenth Amendments, a person or vehicle may be detained for further investigation by a law enforcement officer without a warrant and without probable cause to believe a crime has been committed if the officer has a reasonable suspicion, that can be articulated, that a crime is being committed. The detention must not be unreasonable in length and the investigation must be reasonable. In the case sub judice, Mr. Carrowan was an experienced law enforcement officer; we take judicial notice of the fact that Hyde County is on the coast of North Carolina in an area which is regularly used by smugglers of marijuana; Mr. Carrowan had seen activity in the area of the Lombardo premises which made him suspicious; he had been fired upon while keeping the property under surveillance from the water; and he had seen a boat aground in the area of the premises without a satisfactory reason to him for its being there; and on 13 January 1979 at approximately 12:00 midnight, he saw a truck leave the premises of Nunzio Lombardo. We hold these are articulate reasons that could give rise to a suspicion on Mr. Carrowan's part that marijuana was being carried on the truck. He had a right to stop the truck for further investigation. We also hold the investigation was reasonable in extent and in time. The defendant Trapper was not interrogated. The officers did not open the truck body. They inspected it carefully from the outside until they detected the odor of marijuana. This took approximately ten minutes. Mr. Trapper's Fourth and Fourteenth Amendment rights were not

violated. We hold that the evidence on which the warrant was issued to search the truck was not illegally gained.

The defendants' argument as to the validity of the warrant to search the Lombardo property is based on the invalidity of the warrant to search the truck. Since we have held that the warrant to search the truck was valid, we hold the search warrant for the Nunzio Lombardo premises was also valid.

The defendants also contend the officers exceeded the scope of the warrant in searching the premises of Nunzio Lombardo. The affidavit described the premises to be searched as follows:

> "A housetrailer, double wide, white, owned by Nunzio J. Lumbards [sic], Rt. 1, Scranton, N.C. located on North East side Fortescue [sic] Creek. That the house is approx. .2 mile off of RPR 1145 and is approx. .5 mile west of intersection of RPR 1145 & RUPR 1144. Said house is surrounded by several acres of land owned by Lumbards [sic]."

The warrant directed the officers to conduct a search of the place "described in [the] application." A search of the housetrailer did not reveal any marijuana. The officers also searched a tin shed approximately 30 feet from the housetrailer where they found several bales of marijuana. It is well settled that when a search is made pursuant to a warrant, the scope of the search is limited to the area described in the warrant. *See* United States v. Davis, 557 F. 2d 1239 (8th Cir. 1977); Keiningham v. United States, 287 F. 2d 126 (D.C. Cir. 1960); Rising

Sun Brewing Co. v. United States, 55 F. 2d 827 (3d Cir. 1932). The question posed by this appeal is whether they were authorized to search a tin shed which was 30 feet away and used for storage by the occupants of the housetrailer when the warrant directed the officers to search the housetrailer. The closest case to this one which we have been able to find is State v. Travatello, 24 N.C. App. 511, 211 S.E. 2d 467 (1975). In that case this Court held a search of the defendant's premises did not exceed the scope of the warrant by including a search of a tool shed as well as the house itself. The case does not make it clear whether the warrant only directed a search of the house. We hold that under the warrant in the case sub judice, the officers properly searched the tin storage shed. The evidence was that it was a shed used for storage approximately 30 feet from the housetrailer. There was a concrete walkway connecting the housetrailer to the shed. Judge Godwin found the shed was a part of the curtilage and the officers did not exceed the scope of the warrant by searching the shed. We believe he was correct in this finding.

The defendants next contend that the officers in serving the search warrant for the Nunzio Lombardo residence did not give adequate notice of their identity and purpose before entering the premises and therefore violated the Fourth and Fourteenth Amendments to the United States Constitution and they also violated G.S. 15A-249 and G.S. 15A-251. State Bureau of Investigation Agent Lewis Young testified that in serving the warrant, the officers went to the front door of the housetrailer, knocked on the door and identified themselves as officers. The door was opened and Mr.

Carrowan read the warrant to Nunzio Lombardo. Judge Godwin found that the warrant was executed by reading it to Nunzio Lombardo. We hold that the serving of the warrant for the search of Nunzio Lombardo's premises did not violate his constitutional rights, or his rights under Chapter 15A of the General Statutes.

The defendants' last assignment of error deals with the exclusion of the defendants from the courtroom for a part of the hearing on the motions to suppress the evidence. At the start of the hearing, the defendants moved that the State's witnesses be sequestered. The court allowed this motion and then on its own motion sequestered all the defendants who intended to testify. The first witness for the State was Charlie Carrowan. While he was testifying on direct examination, the court rescinded its order of sequestration and allowed all witnesses, including the defendants, to return to the courtroom. The defendants cite textbook authority for the proposition that a party to an action who is also a witness cannot be sequestered. *See* 88 C.J.S. *Trial* §68 (1955). We do not pass on this question in the case sub judice. The parties were allowed to return to the courtroom before the first witness had completed his testimony in chief. We hold the defendants have not shown they were prejudiced by being excluded from the courtroom for a short period of time.

No error.

Judges MARTIN (Robert M.) and HILL concur.

No. 143 SECOND DISTRICT

SUPREME COURT OF NORTH CAROLINA
Fall Term 1980

STATE OF NORTH CAROLINA

v

PATRICK M. TRAPPER, NUNZIO JAMES LOMBARDO, DENNIS LOMBARDO, VINCENT SERGE LORUSSO, CLARK WILLIAM OLDENBROOK

JUDGMENT DISMISSING APPEAL ON MOTION OF ATTORNEY GENERAL (792SC1188)

This matter came on to be considered upon defendants' notice of appeal from the North Carolina Court of Appeals pursuant to G. S. 7A-30, and the Attorney General's motion to dismiss the appeal of the defendant for lack of substantial constitutional question; upon consideration whereof, it is adjudged by the Court in conference this 4th day of November 1980 that the motion to dismiss the appeal be allowed, and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that the defendants do pay the sum of NINE AND NO/100 DOLLARS ($9.00) and execution issue therefor.

s/ Carlton, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 14th day of November, 1980.

JOHN R. MORGAN

John R. Morgan
Clerk of the Supreme Court
of North Carolina

ORDER ON MOTION TO SUPPRESS

[AR. 170] Motions by all parties defendant to suppress evidence of the January 14, 1979 search of the Ford truck operated by the defendant, Patrick M. Trapper, on which a camper was mounted and the seizure therefrom of bales of marijuana.

The State and the defendants offered evidence and argued the Motions.

From the evidence presented the court finds the following facts, viz:

1. That Hyde County Deputy Sheriff Charlie Carowan became acquainted with defendant, Nunzio James Lombardo, about two years ago when Lombardo first came to Hyde County and bought land located about one-half mile from Carowan's home;

2. That Lombardo stopped Carowan on the road and made inquires about the tract of land that he thereafter bought, and which was located as aforesaid; that Lombardo told Carowan that he was a retired police officer from the State of New York and that he was looking for a place to which he could [AR. 171] retire in an area in which he could hunt;

3. That the land about which Lombardo inquired of Carowan and which he subsequently bought is located adjacent to a paved, rural road and adjacent to the main stream of Fortescue Creek and a tributary thereof

and that it had been cut-over and had a stand of small trees and undergrowth situate on it; that Fortescue Creek flows into Pungo River which constitutes a link in the Intra Coastal Waterway between Fairfield Cut and Pamlico River; that there was no building or other improvement on the land.

4. That although Carowan saw Lombardo infrequently thereafter he did notice and learn that development and improvements were underway on the Lombardo property; that rock driveways were under construction leading from the paved road; that construction equipment was being used on the property; that a gate was erected across the driveway near the place of its intersection with the public road and that it was continuously closed;

5. That Carowan began to receive reports from some of his acquaintances in the neighborhood that they had begun to hear the sounds of heavy truck and boat engines on and near the Lombardo property; that Carowan knew that such sounds were unusual in that area and had, therefore, attracted the attention of neighborhood residents.

6. That on December 21, 1978 Carowan received a report that a boat was aground in Fortescue Creek; that he is thoroughly familiar with the waters of Fortescue Creek and Pungo River; that he is an experienced waterman and possesses an understanding on the effect of wind and tides on vessels, both large and small, in inland waters; that he went to the reported boat and found her stuck in the mud bottom of Fortescue Creek about one (1) mile from the Lombardo property; that

the wind was and had been out of the northwest and that the water was low; that the channel of Fortescue Creek is not marked and that only those who are acquainted with it are [AR. 172] likely to be able to successfully navigate the creek in anything other than a shallow draft boat; that he went to the grounded boat and found that she was the Lady Barbara and that her hailing port was Wilmington, Delaware; that she was 57 feet long and that she was housed-in from stem to stern; that a man stuck his head out of the boat on Carowan's arrival and that Carowan told him he could not pull the Lady Barbara into deeper water; that the man told Carowan that he was cold; that his engines were full of mud and would not run; that one of his shafts had backed-out; and that after the Lady Barbara became disabled in Pungo River she drifted into Fortescue Creek and into the mud where she was aground; that Carowan could not see into the Lady Barbara, and that he went to a trawler which was lying in Pungo River and made arrangements to have the Coast Guard at Hobucken called to the aid of the Lady Barbara and, thereafter, returned to Swan Quarter;

7. That the conduct and manner of the man aboard the Lady Barbara with whom Carowan talked appeared to Carowan to be an unusual and suspicious manner for one in trouble to manifest toward one attempting to offer aid to a boat in trouble; that Carowan knew that the channel in Pungo River was marked and sufficiently deep to accommodate the Lady Barbara and that he did not believe that she had pumped her engines full of mud in Pungo River; that he knew that the wind had been out of the northwest for a number of hours and that he knew that the Lady Barbara could not have

drifted out of Pungo River into Fortescue Creek; that he further knew that the shaft of a forward moving boat did not back out; and that the conduct and manner of the man on the Lady Barbara with whom he talked and the unbelievable account given by him aroused Carowan's suspicions concerning whether the Lady Barbara had been trying to get to the Lombardo property and had run aground because of her pilot's unfamiliarity with the waters of Fortescue Creek;

[AR. 173] 8. That, thereafter, and because he had become suspicious that the Lombardo property was being put to some unlawful use, that he was aware that marijuana was being brought into the inland waters of North Carolina, and after December 21, 1978 and before January 14, 1979, Carowan decided to try to view the Lombardo property from Fortescue Creek; that he dressed in appropriate clothing, put a fish net in the bow of his small boat where it could easily be seen, and ran along Fortescue Creek off of the Lombardo property and while doing so saw a fish box which had washed ashore and stopped his boat to light a cigarette; that while doing so he heard two (2) high-powered rifle shots which, in his opinion, were fired on the Lombardo property, and that he could hear one (1) bullet as it passed near him; that he was convinced that the shots were intentionally fired in his direction to scare him away; and that he left the area.

9. That two (2) or three (3) days later Carowan contacted SBI Agent Lewis Young and discussed with him the above mentioned series of incidents and his resulting suspicion that the Lombardo property was the site of unlawful possession of marijuana or old

furniture stolen from vacant old houses or buildings in the area; that he had previously received numerous reports that vacant old houses or buildings in the area had been entered and furniture had been stolen therefrom;

10. That Carowan made arrangements with State Highway Patrol Trooper Darrell Bass and with Hyde County Deputy Sheriff Melvin Collins to assist him when and if he had an opportunity to make further investigation into the use to which the Lombardo property was being put and the use to which vehicles with heavy engines traveling in and out of the Lombardo property were being put, and that when and if he had an opportunity to further investigate such vehicles, when and if they entered U.S. Highway Number 264, from the aforesaid rural paved road, [AR. 174] he wanted Bass and Collins to situate themselves respectively to the east and west of said intersection, and that a code was agreed upon to be used by them in communicating with each other; that several days after the aforesaid plans and arrangements were made and entered into and on January 13, 1979, Carowan received a report from a confidential informant who lived in the neighborhood that a Ford truck had been observed entering the Lombardo property, that prior thereto Carowan had conducted a continuing surveillance of the aforesaid rural paved road looking for tire tracks left by vehicles entering and leaving the Lombardo property; that on the night of January 13 and following the receipt of the aforementioned report of his confidential informant, he drove to a secluded place from which he could observe the Lombardo gate, but felt that he had been observed by occupants of a red automobile which drove into that area and drove his sheriff's car to his

home where he obtained his personal automobile and drove back to the area in which he had formerly secluded himself and parked his automobile about fifty (50) yards from the Lombardo gate and remained there and surveilled the Lombardo property until about midnight when he saw lights approaching the road on the Lombardo driveway; that clearance lights on the top of the approaching vehicle were lighted; that the engine of the approaching vehicle appeared to be running in low gear, and that he concluded that the vehicle was heavily loaded; that when the vehicle came into full view he observed it was a large pickup truck on which a camper was mounted; that when the truck left the Lombardo gate, it turned toward U.S. Highway Number 264; that Carowan followed the truck to his home place where he left his personal automobile and pursued and followed the pickup truck in his sheriff's patrol car to the point of the intersection of the rural paved road and U.S. Highway Number 264, where the truck made a left turn and proceeded toward Belhaven, in Beaufort County, North Carolina; that before the truck reached U.S. Highway Number 264, Carowan advised Trooper Bass and Deputy Sheriff Collins that the truck was approaching U.S. Highway Number 264 on [AR. 175] aforesaid rural paved road; that when Carowan reached Scranton, he met Deputy Collins who followed him as he continued to follow the truck; that before Carowan reached the Wilkerson Creek Bridge, he advised Trooper Bass of his whereabouts and continued to follow the truck until he found a suitable place to stop it; turned on his blue light and stopped the truck;

11. That shortly thereafter Trooper Bass arrived on the scene; that Carowan determined that Trapper

was the driver of the truck; that in response to Trapper's inquiry, Carowan told him the truck did not violate any traffic law, but that a number of reports had been received concerning the theft of furniture as aforementioned and asked Trapper if he could look into the camper — the truck was bearing New York State license tags; that Trapper advised Carowan that he did not have a key to the camper; that Trooper Bass came to Carowan and told him that the truck was loaded with marijuana; that Deputy Collins, Trooper Bass, and Carowan were all familiar with the odor of marijuana and that they and each of them smelled the odor of marijuana about the camper mounted on the pickup truck;

12. That Carowan arrested Trapper and sent Deputy Collins to Swan Quarter to seek the issuance of a search warrant authorizing the search of the aforesaid truck; that upon the return of Deputy Collins to the scene about 1:40 a.m., January 14, he had in his possession a search warrant authorizing the search of the camper (State Exhibit #2, to which reference is had, is a copy of the search warrant referred to); that the search warrant was served on Trapper and subsequently a search of the truck was made and it was found to be loaded with approximately forty (40) bales (about 4,000 pounds) [sic] of marijauna;

13. The SBI Agent Lewis Young arrived on the scene of the search of the truck, as aforesaid, and was fully advised of the matters and things transpiring before his arrival and that thereafter Carowan made application to Hyde County Magistrate [AR. 176] Spencer for the issuance of a search warrant to search the

Lombardo double-wide house trailer for marijuana, a controlled substance, and that the magistrate issued the warrant which was executed at 5:15 o'clock a.m., January 14, 1979, by reading the same to Nunzio James Lombardo and that the Lombardo house and curtilage, including a metal storage building was searched and that a large quantity of baled and loose marijuana was found and seized from the aforesaid metal building and that other property and things as listed in the inventory on file with the court were found and seized.

THE COURT CONCLUDES:

1. That Deputy Sheriff Carowan had probable cause to believe that the aforesaid truck operated by the defendant Trapper was being put to an unlawful use at the time he stopped it, in the early hours of January 14, 1979, on U.S. Highway Number 264, in Hyde County, North Carolina;

2. That the Assistant Clerk of the Superior Court who issued a warrant authorizing a search of the aforesaid truck had before her sworn testimony constituting probable cause for the issuance of the search warrant authorizing the search of the aforesaid truck and the seizure of the marijuana subsequently found therein;

3. That Hyde County Magistrate Spencer had before him sworn testimony constituting probable cause for the issuance of the search warrant authorizing the search of the Lombardo home;

4. That Deputy Sheriff Carowan was authorized [AR. 177] by the search warrant issued by Magistrate

Spencer to search the Lombardo home and its curtilage which included the aforesaid metal storage building and to seize the marijuana found on those premises and the other property and things there seized as enumerated in the inventory on file in this court, and;

5. That the aforesaid motions of the several defendants to suppress the aforesaid evidence seized in the search of the aforesaid truck and Lombardo house and curtilage should be DENIED.

IT IS, THEREFORE, ORDERED that the aforesaid Motions to Suppress Evidence, as aforesaid, be and the same are DENIED.

Signed out of Session, County, and District by and with the consent of all parties hereto.

This the 3rd day of August, 1979.

s/ A. PILSTON GODWIN, JR.
Judge Presiding

[AR. 4]

SEARCH WARRANT — TRAPPER

To any officer with authority and territorial jurisdiction to conduct the search authorized by this Warrant:

THE UNDERSIGNED FINDS THAT THERE IS PROBABLE CAUSE TO BELIEVE that the property described in the application on the reverse hereof and

related to the commission of a crime is located as described in the application.

Therefore, you are commanded to search (that [AR. 5] vehicle) (that person) described in the application for the property in question. If this property is found, seize it and keep it subject to court order.

YOU ARE DIRECTED TO EXECUTE THIS WARRANT WITHIN FORTY-EIGHT (48) HOURS FROM THE TIME INDICATED BELOW AND MAKE DUE RETURN TO THE CLERK OF THE ISSUING COURT.

Issued this 14th day of January, 1979, at 1:13 o'clock a.m., upon information furnished under oath by the person or persons named below.

Charles M. Collins, Deputy Sheriff
Name of Applicant

s/ LENORA R. BRIGHT
Assistant Clerk of Superior Court

RETURN

I hereby certify that on the 14 day of Jan., 1979 at 1:16 o'clock p.m. this warrant came into my hands.

On the 14 day of Jan., 1978 at 1:50 o'clock a.m., I made a search of 1978 Ford truck and camper described

in warrant and Patrick M. Trapper as therein commanded. (X) I seized the items listed on the attached inventory.

I return this search warrant this 14 day of Jan., 1979 at __ o'clock __.m.

s/ CHARLIE CARAWAN

Signature

Deputy Sheriff

Title and Agency

[AR. 6]

APPLICATION FOR [illegible] WARRANT

I, Charles W. Collins, Deputy Sheriff, Hyde County being
(Insert name and address; or, if a law officer, insert name, rank and agency.)
duly sworn, hereby request that the court issue a warrant to search the (person) (and) (vehicle) described in this application and to find and seize the items described in this application. There is probable cause to believe that certain property, to wit: marihuana and other controlled substances

(constitutes evidence of) (constitutes evidence of the identity of a person participating in) a crime, to wit: possession and selling of controlled substances Marihuana and other drugs.

and the property is located ([redacted] on the vehicle) (on the person) described as follows: (Unmistakably describe the building, premises, vehicle or person -- or combination -- to be searched.) 1978 Ford pickt. truck with camper, New York license plate # 9254-NT, vehicle identification # F26FSKAE0990 and Patrick M. M. Trapper

The applicant swears to the following facts to establish probable cause for the issuance of a search warrant:

[redacted]

a strong odor of marihuana was noticed as [redacted] license check was being made on driver of said vehicle. Information was given in confidance and from a very reliable informant, also.

(*Continue if necessary.)

Sworn to and subscribed before me
this 14th day of January, 19 79.

Lenora L. Burbt
Assistant Deputy Clerk of Superior Court
[redacted]

s/ Charles W. Collins
Signature of Applicant

* * * * *

☐ In addition to the allegations of fact included in this application, this application is supported by affidavits attached, made by

☐ In addition to the allegations of fact included above, this application is supported by sworn testimony, given by

and reduced to writing by me and filed with the clerk.

Assistant Deputy Clerk of Superior Court
Magistrate/District/Superior Court Judge

* If a continuation is necessary, continue the statement on an attached sheet of paper, with a notation saying 'see attachment.' Date the continuation and include on it the signatures of applicant and issuing officia..

[AR. 7]

SEARCH WARRANT — NUNZIO J. LUMBARDS

To any officer with authority and territorial jurisdiction to conduct the search authorized by this Warrant:

THE UNDERSIGNED FINDS THAT THERE IS PROBABLE CAUSE TO BELIEVE that the property described in the application on the reverse hereof and related to the commission of a crime is located as described in the application.

Therefore, you are commanded to search (those premises) (that vehicle) (that person) described in the application for the property in question. If this property is found, seize it and keep it subject to court order.

YOU ARE DIRECTED TO EXECUTE THIS WARRANT WITHIN FORTY-EIGHT (48) HOURS FROM THE TIME INDICATED BELOW AND MAKE DUE RETURN TO THE CLERK OF THE ISSUING COURT.

Issued this 14 day of January, 1979, at _____ o'clock a.m., upon information furnished under oath by the person or persons name below.

s/ CHARLIE CARAWAN
Name of Applicant

s/ WARREN A. SPENCER
Magistrate

RETURN

I hereby certify that on the 14 day of January, 1979 at __ o'clock a.m. this warrant came into my hands.

(X) On the 14 day of Jan., 1979, at 5:15 a.m. o'clock a.m., I made a search of The Property described in this application for search warrant belonging to NUNZIO J. Lumbards as therein commanded.

s/ CHARLIE CARAWAN
Deputy Sheriff

[AR. 8]

APPLICATION FOR SEARCH WARRANT

I, C. A. CARAWAN, Deputy Hyde Co. Sher. Dept., being
(Insert name and address; if, e. g., a law officer, insert name, rank and agency)

duly sworn, hereby request that the court issue a warrant to search the (person) (place) (vehicle) described in this application and to find and seize the items described in this application. There is probable cause to believe that certain property, to wit: MARIJUANA

(constitutes evidence of) (constitutes evidence of the identity of a person participating in) a crime, to wit: POSSESSION TO DISTRIBUTE CONTROLLED SUBSTANCES

and the property is located (in the place) (in the vehicle) (on the person) described as follows: (Unmistakably describe the building, premises, vehicle or person -- or combination -- to be searched.) A HOUSE TRAILER, DOUBLE WIDE, WHITE, OWNED BY NORRIS J. LUMBARDS, RT 1, SWANNTON, NC, LOCATED NORTHEAST SIDE FORTESCUE CREEK. THAT SAID HOUSE IS APPROX. 1/2 MILE OFF OF RTE 1145 AND IS APPROX. .5 MILE WEST OF INTERSECTION OF RTE 1145 & RTE 1144. SAID HOUSE IS SURROUNDED BY SEVERAL OUTBUILDINGS.

The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: THAT ON 1-8-74 AFFIANT WAS ADVISED BY A CONFIDENTIAL SOURCE WHO HAD BEEN WITHIN THE ABOVE DESCRIBED PROPERTY ENTRY WAY ON RTE 1145. THAT ON 1-3-74 THIS SOURCE OBSERVED A TRACTOR-PULLING TRUCK ENTER THE PROPERTY. THAT ON 1-3-74 SOURCE SAID THEY HEARD VOICES LIKE LARGE TRUCK MOTOR ROARING & SOURCE ALSO COMMENTED ON HEAVY METER USAGE & TRUCK NOISES AT NIGHT WHICH KEPT SOURCE AWAKE. THAT THE PROPERTY BELONGS TO NORRIS LUMBARDS WHO TOLD AFFIANT IN PERSONAL CONVERSATION THAT HE PURCHASED THE PROPERTY FOR VACATION & RETIREMENT. THAT 12-31-73 AFFIANT OBSERVED A STATE HIGHWAY COMMISSION DEPARTMENT TRUCK WITH TRAILER ENTER SAID PROPERTY ON INTERSTATE CONCRETE APPROX. 1 MILE FROM LUMBARDS' PROPERTY. SAID TRUCK WAS STUCK IN 2½ FT. OF WATER. THAT AT 5:30 P.M. AFFIANT SAW SAME TRUCK WITH TRACTOR PULLING EQUIPMENT PROPERTY ON 1-13-74. THAT SAID EQUIPMENT WAS REMOVED AT 12 MIDNIGHT 1-13-74. SAID TRUCK WAS STOPPED BY AFFIANT & SEARCH WITH WARRANT ON 1-14-74 & FOUND TO CONTAIN APPROX 25 BALES OF MARIJUANA. That said source is reliable & is known to your Affiant as Hyde Co. & Section Community Service has given information to affiant that has proved to be true & reliable. That said information has been checked out by affiant on 1-13-74 & was found true. AFFIANT HAS KNOWN SOURCE FOR 4 YRS.

(*Continue if necessary.)

Sworn to and subscribed before me
this 14 day of JANUARY, 1974.

MARSHALL DAMON
~~Assistant Deputy Clerk of Superior Court~~
Magistrate/~~District~~/Superior Court Judge

C. A. Carawan III
Signature of Applicant

* * * * *

☐ In addition to the allegations of fact included in this application, this application is supported by affidavits attached, made by _____

☐ In addition to the allegations of fact included above, this application is supported by sworn testimony, given by _____ and recorded to writing by me and filed with the clerk.

Assistant Deputy Clerk of Superior Court
Magistrate/District/Superior Court Judge

* If a continuation is necessary, continue the statement on an attached sheet of paper with a notation saying "see attachment." Date the continuation and include on it the signatures of applicant and issuing official.

Excerpts from Motion to Suppress Transcript

[MST. 11] A. At this time Mr. Lombardo advised me that he had worked with the police force in New York and he was interested in buying this piece of land for retirement and hunting purposes.

* * * * *

[MST. 15] Q. Mr. Sheriff, after this occasion you met Mr. Lombardo, did you observe some development on the property?

A. Yessir, I did.

Q. After the development took place did you begin to receive reports from people in the community there?

A. Yesir, I did.

Q. Would you tell us the nature of this, if you would?

HIRSCHHORN: OBJECTION, Hearsay.

OVERRULED.

A. After development started on the property, there was a rock road put in from this rural paved road back to the property and it was the rural paved road was a black top road. People lived up and down this road on the black top road. I had complaints from a neighbor about noises that sounded like heavy boat motors and trucks and in fact I saw tracks where a

truck missed going in there and was pulled out, late at night and was keeping them awake.

* * * * *

[MST. 22] GRIFFIN: Q. Sheriff, did you at some point take your boat and go up into Fortiscue Creek to look at the property from the waterside?

A. I tried.

Q. When was it you did this?

A. This was, I don't have the exact date, but this was also after the date of the Lady Barbara.

Q. It was after the time that the Lady Barbara was aground in the creek?

A. Yessir.

Q. Tell us what you did on that occasion?

A. I went home and put on some old coveralls, so no one would recognize me. My boat is a flat bottom wood boat, homemade boat. I put a net in the boat. I was trying to observe this property. This property had a gate across the driveway with posted signes [MST. 23] on it and stayed locked most of the time. This property is close to the water, the house is only about 50 yards from the water but there is a place cleared out for the house and then there is a natural growth of thick pines around and a road around it that goes to the water. In some places you can see some of the house from the water.

Q. From the water?

A. Yes, I took my boat and come down this shore, the Northeast side of Fortiscue creek and there was a box where the creek or the tributary joins this land on the Northwest side, there was a box ashore on the other side, a paper fish box.

* * * * *

[MST. 23] Q. Let me ask you this, why was it you were going up there and take a look at this property?

A. So I could observe this property.

Q. Why did you want to look at it?

A. Because of the traffic and the complaints I had had from neighbors and noises late at night and people going in and out of this property at night. I knew in my mind that there was something [MST. 24] going on that should not be in this area.

Q. When you went up there on the boat, describe for us what happened?

A. At this particular time nothing happened. I went on down the creek. I actually did set a net. When I came back it put me facing the property, coming in. I stopped right close to this point and lit a cigarett so I could observe. I didn't cut the motor off. I put it out of gear and lit a cigarett. A high powered rifle bullet came by me near enough that I could hear it splitting the air and it came from the Lombardo place. The

second shot was fired. I did not hear the bullet but I heard the report.

Q. Where did those rifle shots come from?

HIRSCHHORN: OBJECTION, That is highly speculative.

THE COURT: He can state his opinion concerning the source of the sound he heard the gunfire that he heard. You have been living in this county how long, did you say?

* * * * *

[MST. 25] GRIFFIN: Do you have an opinion satisfactory to yourself as to where those shots came from?

A. Yessir, I do.

Q. Where did they come from?

HIRSCHHORN: OBJECTION.

OVERRULED.

A. Lombardo's property.

Q. At this point, is there any other developed place near where you were at that time, any houses, or hunting camps, or anything up that creek there?

A. Not as near to me as Lombardo's place was.

Q. When this happened, what did you do?

A. I left.

* * * * *

[MST. 26] Q. After that occurred, did you begin surveilance of this property from the roadside, not from the waterside?

A. Yessir.

* * * * *

[MST. 28] Q. Now, I direct your attention to January 13, 1979, I believe is the correct date, did you undertake a surveilance of the premises on that date, in person?

A. Yessir, I did.

* * * * *

[MST. 34] Q. Sheriff, the report you had received at 5:30, did that person describe the vehicle that went in there at 5:30?

A. Yessir.

Q. What description was given to you?

HIRSCHHORN: OBJECTION.

OVERRULED.

A. A ford truck with camper body on it.

Q. You saw the clearance lights and headlights, what happened to that particular vehicle at that time?

A. I was observing it as close as possible. It was traveling far to slow for the rate the motor was turning.

HIRSCHHORN: OBJECTION.

OVERRULED.

Q. What did you notice about the engine?

CURTIS: OBJECTION

THE COURT: A Leading questions, but OVERRULED.

[MST. 35] A. The motor was turning at too high a rate of speed, it was in a low gear. It gave me the impression that it was loaded.

CURTIS. OBJECTION.

OVERRULED.

Q. Did it come out of the paved road?

A. Not while I was sitting where I was. I moved.

Q. Describe what you did.

A. When I saw this truck's headlights I knew I had to get in my patrol car because I had no blue light on my personal car. I only had a walkie-talkie to talk to the other two boys I had in position on 264.

Q. You say you had somebody assisting you on this occasion?

A. Yessir.

Q. Who did you have?

A. Trooper Bass and Deputy Collins.

* * * * *

[MST. 35] Q. Tell us what you did when this truck proceeded out to the road?

A. The truck was getting about half way out, it had come about halfway out from Lombardo's cabin to the rural paved road, on the rock road.

* * * * *

[MST. 37] A. I called Trooper Bass. I told him I had a 10-50. We had these signals already fixed up in case we needed them.

Q. Why did you use a false signal, sheriff?

A. Because a scanner, anyone can buy our frequency, they can copy us on a scanner, and know what we were doing. I did not want to stop this truck in this area because I was thinking at the time that there was marijuana in Lombardo's place and I knew if I stopped it close to it that we were going to have trouble, probably have a fire on hand or something and probably wouldn't get the chance to search the place.

VOERMAN: OBJECTION.

COURT: That Objection is SUSTAINED, a strike is allowed.

HIRSCHHORN: I would not like to join in that objection, I would like that answer in the record.

* * * * *

[MST. 40] Q. When you went up to the driver's side, who did you find out the operator of the vehicle to be?

A. Mr. Trapper sitting back there.

Q. When you first approached the vehicle what did you say to him?

A. It is just a policy, and always has been, to ask a person for his driver's license to get their name so you can talk to them on a name-to-name basis.

Q. Did he present a drivers license to you at that time?

A. Yessir.

[MST. 41] Q. After the drivers license was presented to you, what did you say to him then?

A. I told Mr. Trapper that we had been having trouble in this area with people taking furniture from old houses, and asked him if I could see in the camper. He told me he did not have a key.

Q. He said what?

A. He did not have a key to the camper.

Q. Go ahead.

A. I asked him for the registration card to the camper. He gave me the registration card.

Q. To whom was the vehicle registered?

A. I cannot tell you, but I will tell you what happened.

Q. What happened after he presented that to you?

A. Trooper Bass had drove up and stopped. I gave him the registration card.

* * * * *

[MST. 45] A. At that particular time I forget now exactly where I put Trapper under arrest. I don't know whether I put Trapper under arrest at that time or if Collins did.

* * * * *

[MST. 47] Q. Upon smelling this, what did you do then?

A. After I walked back to Trapper on the left hand side of the truck, Collins also went around there

on that side, and he advised me that he could smell marijuana. At this time I advised Collins to get all the information from the camper and the truck and go back and get a search warrant. At this time we had placed Trapper under arrest.

COURT: Trapper was under arrest at what time?

A. Trapper was under arrest when I sent Collins, Collins went back to get a search warrant.

* * * * *

[MST. 56] Q. What is the first thing Mr. Bass did after he got there?

A. I was having trouble with the . . . I don't work too much traffic, and I was having trouble with the registration.

GASKINS: I'm sorry, I didn't hear that.

A. The registration, I was having trouble with it. I believe I gave the registration card to Trooper Bass to check.

Q. As soon as he got there you say you gave the registration [MST. 57] card to him to check?

A. I believe that's right, that is the first thing I remember at this time, that is the first thing Trooper Bass and myself had in common.

Q. And at that point he went to his car to check the registration, is that right?

A. Yessir.

Q. And he checked it?

A. Yessir.

Q. And he came back and spoke to you, is that right?

A. He came back and went on the right hand side of the truck.

Q. Is that after he checked the registration?

A. Yessir.

* * * * *

[MST. 60] Q. When you stopped Mr. Trapper, I think you told him something about being concerned about stolen furniture?

A. Yessir.

Q. You didn't believe, or have any suspicions that Mr. Trapper himself had stolen any furniture that night, did you?

A. No sir, but we have been having trouble in this area with people stealing furniture and I didn't know what he had in there. I believed he had marijuana in there, but he could have also had old furniture in there.

Q. You thought it might have been stolen furniture too, didn't you?

A I figured it was going to be stolen furniture or marijuana.

Q. It could have been one or the other.

A. I figured there was something in there, I figured there was something going wrong up at Lombardo's place is the reason I stopped that truck, and these two things were most forward in my mind.

* * * * *

[MST. 62] Q. And you all took him at some point and put him in a squad car, didn't you?

A. Yessir.

Q. Was that shortly after he got out?

A. I would say this was about ten minutes after he got out.

Q. That was before you got a search warrant?

A. Yessir.

Q. And he was in a squad car?

A. Yessir.

* * * * *

[MST. 63] Q. Was he with you at that point, Mr. Trapper?

A. Yes.

Q. Was Mr. Collins with you and Mr. Trapper at that time?

A. No, Mr. Collins had come back to Swan Quarter to get the search warrant.

Q. After that point you all had the keys to Mr. Trapper's truck?

A. I am sure that we kept the keys or left them in the truck. I would say they were not in Mr. Trapper's possession, not the keys to the truck.

* * * * *

[MST. 68] A. Really, I didn't get too many complaints on the place until about six weeks before this when the complaints got to be bothersome. I told some of them not to talk about it, just to wait a while and I might could tell them more, to keep them quiet.

Q. Is it fair to say then, at the time you received those complaints that you had some suspicious about what was going on there?

A. Yes, I became very suspicious after the Lady Barbara.

Q. After the Lady Barbara?

A. Yes.

Q. You had heard the noises or had the complaints about the noises, I believe you testified, prior to the Lady Barbara being seen, had you not?

A. I had been kind of keeping watch on the place, but I [MST. 69] don't recall saying that I had had complaints before that time.

Q. Is it fair to say then that you had just sort of been keeping watch on the place before you had any complaints or before you saw the Lady Barbara?

A. I would say I didn't have enough complaints to amount to anything, not enough to worry me until after this time. After this time I did receive complaints, I did hear the noises at my home.

Q. My question was, Mr. Carrowan, before you heard the noises and before you saw the Lady Barbara that you yourself had in your mind had some suspicious [sic] about this place?

A. Yessir, I did.

Q. And those suspicions were not based on anybody's complaints or anything you had seen, they were just suspicions in your mind, is that right?

A. Suspicious were traffic, strange cars. We live in an isolated area. It is a loop road you cannot go in any further off of 264, and we don't pick up many strange cars that we don't know. Strange cars, out of state cars and things like this draws attention and people ask me about them.

Q. So then the suspicious [sic] were that there were cars you didn't recognize and some out of state cars?

A. And the traffic in that road.

Q. Yes, but not of any illegal activities that you know of?

A. No, not that I know or or I would have had them up here before now.

[MST. 70] Q. Just because you started seeing some strangers in some strange cars?

A. No sir.

Q. Isn't that what you just said?

A. No sir. It was abundance of things, strange cars, traffic in and out and Mr. Lombardo's activity. He had nothing in common with any law enforcement officers in Hyde County. His gate was lock, stayed locked most of the time. This was a metal gate put across there and these things just don't look like an ordinary hunting camp. We don't have it like that in this area. It is very unusual. You couldn't observe them, you couldn't see the place from the water, you could barely see the top unless you got up in the little tributary. You could

actually see it better from the road, at nearabout a North view than you could anywhere else, looking from the North towards the South, and a little beyond a wooded area back looking from the East toward the West, they put you too far off.

Q. Is it fair to say, Mr. Carrowan that you became suspicious because it was sort of a private place and you couldn't see it and you didn't know what was going on there?

A. It was better than private.

* * * * *

[MST. 72] Q. Had you seen any of the other Defendants in this case, did you see any of them on that boat?

A. No sir, just one man is all I saw on that boat.

* * * * *

[MST. 73] Q. I am talking about the day the Coast Guard pulled the boat off the bottom at Fortiscue Creek, you did not detect any illegal activity by the boat and as far as you knew neither did the Coast Guard, is that correct?

A. That is right.

* * * * *

[MST. 82] Q. Now, on the date of January 13, I believe this all occurred on January 13, is that correct?

A. On January 13, that was the day that I went into cover to watch this particular truck, yes.

Q. So you had information that a truck had gone into the Lombardo property?

A. Yessir.

Q. That was from a confidential informant?

A. Yessir.

Q. I believe you testified earlier that that was a good person or neighbor, or some characterization of that sort?

A. Yes, that is a good person, good reference.

Q. I believe you said it was a neighbor?

A. Yessir.

* * * * *

[MST. 82] Q. Had you ever received such information while you still thought a truck was still in there?

A. No sir, this was the first information that I had that [MST. 83] a truck had gone in and that I had a chance to observe it.

Q. That is what I was asking, this was the first time that you had a chance to get there?

A. Yessir. Most of the complaints were that a truck had been in before and it was too late for me to go, when I got the word it was too late.

* * * * *

[MST. 84] Q. You had arranged for Mr. Bass, the highway patrolman to ge [sic] in radio communication with you, is that correct?

A. Yessir.

Q. And you had arranged for another deputy to be in radio communication with you?

A. Yessir, a deputy.

* * * * *

[MST. 84] Q. So, it was your intent, I take it, based upon your actions after you observed the truck coming out, it was your intent at that time to stop this truck?

A. Yessir, it was.

Q. Was it your intent to conduct a search of this truck?

A. If I had further reason to search this truck such as if he denied me the privilege to look or anything else that he had to hide, anything that would give me

any idea that he had something to hide, yes, I intended to search it.

* * * * *

[MST. 85] Q. I am trying to understand what you told me, if I understand what you said was, it was your intent to stop the truck?

A. Yes, if I could find a reason.

* * * * *

[MST. 95] Q. Mr. Carrowan, after the Lady Barbara incident, you were sure in your own mind as far as you were concerned that the property, the Lombardo property was being used for storing or transporting marijuana, were you not?

A. In my mind, yessir.

* * * * *

[MST. 102] Q. On January 14 or the day before you stopped this truck, you had had conversations with Trooper bass, had you not?

A. Yessir, repeat what date?

Q. On the day before you stopped the truck that night, during the daytime prior to stopping it during the evening?

A. I wouldn't say that I had a conversation with him. Yes, I had a conversation with him the day before

I stopped that truck because I talked to him that afternoon when I decided I would check it out, and decided I was going to go ahead and watch this truck. I did talk to him over the telephone. I didn't talk to him anymore before I talked to him on the radio which was the same day. No, that was the next morning, it was after 12:00 when I talked to him over the radio again.

Q. What did you tell him during the day?

A. When I talked to him over the telephone I told him, we didn't want to put anymore than we had to on the radio. I talked to him and he said, "I'll talk to Collins, I'll call him myself, I'll tend to that, you go ahead." I told him that I was ready and that I was going to start observing something.

Q. Did you have any agreement as to where he would be during the evening while you were doing your observation?

A. Yessir, but he had changed, they had changed positions, we had an agreement before.

* * * * *

[MST. 106] Q. [. . . .] How many miles is it from the Lorusso property, I'm sorry, the Lombardo property to the place you stopped the truck?

A. I believe you are going to have to add this up. From the Lombardo property is one and one tenth (1.1) mile on 1141 to 1145: it is 2 miles to 1139; 4 miles to US 264; it is one and seven tenths (1.7) miles on 264 to 1145;

and from there on to where I stopped him is six and eight tenths (6.8) miles.

Q. You stopped this vehicle within 1 mile of the county line, did you not?

A. Yessir.

Q. The Beaufort County line?

A. It is about a mile, I wouldn't say exactly. It may be a little over a mile.

* * * * *

[MST. 107] Q. As far as you could observe the driver of this truck was not breaking any motor vehicle laws?

A. For an individual it would have been, yes, breaking a vehicle law, but to a law enforcement officer, no.

THE COURT: I anticipate that you are telling him that you feel that you were not violating the law, but I understood his question to inquire whether you saw Trapper, the driver of the truck, violate any motor vehicle law?

A. No sir, I did not.

* * * * *

[MST. 109] Q. You asked him for his drivers license?

A. Yessir.

Q. And he gave them to you?

A. Yessir.

Q. And they were correct drivers license, were they not? They showed his true identity?

A. Yessir, to the best of my knowledge, I didn't question it

Q. It said Pat Trapper on it, did it not?

A. Yes.

Q. Did you also ask him for the registration?

A. Yessir.

Q. And he was able to provide a registration, was he not?

A. Yessir.

* * * * *

[MST. 115] Q. Afte the shooting incident that you have described, did you attempt to at anytime to get a better look at the property, specifically the trailer and the shed by going on the land?

A. After when?

Q. The shooting incident you have described?

A. I didn't understand your question.

Q. You told the Judge that when you were in your boat you heard a couple of shots. One bullet whistled by you?

A. Yessir

Q. What I am asking you, is when that occurred, did you [MST. 116] attempt to investigate the matter further by going up to the dock, not the same day but several days thereafter?

A. No sir.

Q. Did you make any effort to go on the property to investigate what was going on in view of the fact that you had been, as you said, shot at?

A. You mean before we made the arrest?

Q. Yes.

A. No sir.

* * * * *

[MST. 119] Q. I recall your testifying earlier the reason you set up a signal, a series of signals with Mr. Collins about a call 10-50, you didn't want your radio signals picked up by a scanner, is that right?

A. Yes, that is right.

Q. You were concerned that if something happened and your signal was picked up you wouldn't get a chance to search the Lombardo house, is that right?

A. That is right. If we found anything on that truck, we would not, we were afraid we would have a fire or something. I didn't want anyone to know.

* * * * *

[MST. 124] Q. Describe for us what you did when you came up behind him?

A. When I arrived I observed Mr. Carrowan's vehicle directly behind the Trapper vehicle. Behind the Carrowan Vehicle was Deputy Collins' vehicle. I pulled up behind those and got out and walked up to Mr. Carrowan, Mr. Collins and Mr. Trapper. Mr. Carrowan had the registration card in his hand. He gave it to me and I went back to my patrol car to request a vehicle ownership check by computer files. It checked out to the proper owner in that respect. I walked back to Mr. Carrowan and gave him the registration card and told him that it checked out properly. I walked around on [MST. 125] the right hand side of the camper, all the way around to the front and stood there a few minutes.

Q. Which way did you go around the camper?

A. On the right hand side, the passenger side.

* * * * *

[MST. 154] Q. You all held him there for some

period of time before any marijuana was smelled, did you not?

A. Yessir.

[MST. 155] Q. He was not free to leave, was he?

A. No sir.

* * * * *

[MST. 160] Q. Could you tell me, sir, whether you obtained information "in confidence and from a very reliable informant" or whether you were simply putting in the application what Mr. Carrowan had told you.

A. At that time I was putting in the application what Mr. Carrowan told me.

* * * * *

[MST. 166] Q. After that was done, at some point did you go out into the yard to a building near the home and residence you had been in?

A. Yessir, it would have been at least five minutes or more after the search warrant had been completed because we had gotten the people together. Someone came in and advised me that there bales in the warehouse out back.

* * * * *

NO. 80-1163

FILED

APR 2 1981

ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

October Term, 1980

PATRICK M. TRAPPER, NUNZIO JAMES LOMBARDO, DENNIS LOMBARDO, VINCENT SERGE LORUSSSO, CLARK WILLIAM OLDENBROOK,
Petitioners,

v.

STATE OF NORTH CAROLINA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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QUESTIONS PRESENTED

1. WHETHER THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED DUE TO THE FAILURE OF PETITIONERS TO RELY ON THE RECORD BEFORE THE STATE APPELLATE COURTS TO PREPARE THE PETITION AND THE INCLUSION OF MATERIALS THEREIN WHICH THIS COURT MAY NOT CONSIDER.

2. WHETHER THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED DUE TO THE FAILURE OF PETITIONERS TO ESTABLISH THAT THE INVESTIGATIVE STOP OF A VEHICLE AND THE BRIEF DETENTION OF ITS DRIVER BY A LAW ENFORCEMENT OFFICER WERE IN VIOLATION OF THE FOURTH AMENDMENT.

3. WHETHER THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED DUE TO THE FAILURE OF PETITIONERS TO ESTABLISH THAT THE SEARCH WARRANTS WERE ISSUED UPON AN INSUFFICIENT SHOWING OF FACTS TO ESTABLISH PROBABLE CAUSE AND ILLEGALLY SEIZED EVIDENCE.

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STATE OF NORTH CAROLINA,
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

CITATION TO THE OPINION BELOW

The opinion of the North Carolina Court of Appeals is reported at 48 N.C. App. 481, 269 SE 2d 680 (1980).

JURISDICTION

The judgment of the North Carolina Court of Appeals was filed on September 2, 1980 and certified September 22, 1980, affirming the trial court's denial of Petitioners' Motion to Suppress. On November 14, 1980, the Supreme Court of

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North Carolina entered its Judgment Dismissing Appeal on Motion of Attorney General. The jurisdiction of this Court was invoked by Petitioners under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On January 14, 1979, Petitioners were served with Warrants for Arrest charging them with various crimes connected with the possession, sale and delivery of marijuana. On February 5, 1979, the Hyde Country Grand Jury returned true bills of indictment against Petitioners for various crimes connected with the possession, sale and delivery of marijuana.

Prior to trial, Motions to Suppress were filed on behalf of each of the Petitioners. These Motions alleged that the evidence sought to be introduced against Petitioners at trial was seized from Petitioners in violation of rights guaranteed to them by the Fourth Amendment to the Constitution of the United States. The Motions to Suppress were consolidated and heard on July 2-3, 1979, in the General Court of Justice, Superior Court Division, with the Honorable A. Pilston Godwin, Jr., presiding. On August 3, 1979, Judge Godwin entered an order denying the Motions to Suppress Evidence filed by Petitioners. (R. pp. 170-177).[1]

---

[1]The symbol "R" refers to the Record on Appeal before the North Carolina Appellate Courts.

On August 13, 1979, Petitioners were brought to trial before the Honorable James R. Strickland at the August 13, 1979 Criminal Session of the Superior Court Division of the Hyde Country General Court of Justice. Petitioners Trapper, Lorusso, and Oldenbrook each pled guilty to the crime of possession of marijuana with the intent to sell and distribute. Petitioners Nunzio and Dennis Lombardo each pled guilty to the crime of felonious sale and delivery of marijuana. Each Petitioner received a suspended sentence and probation and by virtue of a plea bargain the remaining crimes against him were dismissed. (R. p. 4).

At the hearing on the Motions to Suppress, it was established that Deputy Sheriff Charlie Carrowan had followed a Ford truck with a camper body when it left the property of Petitioner Nunzio Lombardo at midnight on January 14, 1979. Subsequently, the vehicle being operated by Petitioner Trapper was stopped by Deputy Carrowan and Deputy Collins. During a license and registration check, these officers, who were being assisted by Trooper Darrell Bass of the North Carolina State Highway Patrol, detected the odor of marijuana coming from the vehicle. Deputy Collins was dispatched to obtain a search warrant for the truck. The subsequent search of the truck produced forty (40) bales of marijuana.

After the search of the truck, a second search warrant was obtained for the property owned by Petitioner Nunzio Lombardo. When that warrant was executed, Petitioners Nunzio Lombardo, Dennis Lombardo, Vincent Lorusso and Clark Oldenbrook were arrested. In the search of the Lombardo property, numerous paper items including lists, numbers, and cash money in excess of $145,000.00 were seized from the mobile home and 511 bales of marijuana were seized from the adjacent tin building.

The State of North Carolina presented testimony at the hearings on the Motions to Dismiss by Deputy Carrowan, Deputy Collins, Trooper Bass and Special Agent Lewis Young

of the State Bureau of Investigation. The decision to stop the Trapper vehicle was made by Deputy Carrowan whose testimony established that he reasonably believed the vehicle and Petitioner Trapper were engaged in criminal activity when stopped.

Deputy Carrowan is a life-long resident of the isolated area in Hyde County where the Lombardo property was located. (R.p. 64). He was raised on Fortiscue Creek and still lives on the creek having been a commercial fisherman for a lot of his life. (R.pp. 60, 61, 91). He had been a deputy sheriff for twelve (12) years prior to hearing.

Deputy Carrowan first met Petitioner Nunzio Lombardo about two years before the hearing when he first came to Hyde County to buy land. While the Deputy Carrowan was patrolling and in uniform, Petitioner Nunzio Lombardo beckoned to him and introduced himself to the Deputy saying that he had retired from the New York Police Force. Petitioner Nunzio Lombardo said he was interested in buying a piece of land for retirement and hunting purposes pointing out the piece of land beside which they stood talking; it was about a half-mile from Deputy Carrowan's house. (R.p. 59).

When Petitioner Nunzio Lombardo bought the property, it had no buildings on it only a small growth of timber. The land joins the main stream of Fortiscue Creek. (R.p. 59). At the Lombardo property, Fortiscue Creek has about five (5) feet channel depth. (R.p. 61). Fortiscue Creek is a dead end creek and a tributary of the Pungo River which is a part of the Inland Waterway. (R.pp. 61, 62).

Shortly after the property was purchased, a rock road was built out to the rural paved road that runs through the community. (R.p. 60). The rural paved road is one in a series of three that loops out to U.S. 264. (R.p. 97). It is about seven miles from this isolated, rural community to U.S. 264. (R.p. 69).

Around the 1st of December, 1978, Deputy Carrowan's attention was increasingly drawn to the Lombardo property.

His neighbors in the community began to complain about boat noises and truck noises coming from the Lombardo property. (R.pp. 82, 83). He also began to notice and to be asked by his neighbors about strange, out-of-state cars. In their isolated community, it is unusual to see strange, or out-of-state cars. He had also noted the metal gate, which was usually locked, at the Lombardo property. That was an unusual feature for hunting camps in the area. Deputy Carrowan also found it suspicious that a retired police officer had nothing in common with any law enforcement officers in Hyde County. (R.p. 83).

On December 21, 1978, a series of events began which convinced Deputy Carrowan that the Lombardo property was being used to smuggle marijuana. (R.pp. 81, 83). That day while he was in the courtroom, he received a call to go to Fortiscue Creek to tow a small boat, about 27 feet, out to deeper water. When he arrived, he found a 57 foot boat named the Lady Barbara from Wilmington, Delaware. (R.p. 60). The stern of the boat was floating in about two and one-half feet of water or less. The boat was housed straight up, was built like a barge, and was a perfect cargo vessel for shallow water. It was the largest boat he had ever seen in Fortiscue Creek. (R.p. 91). It was aground on the shoals at the mouth of the creek on the northwest shoreline about a mile from the Lombardo property. (R.p. 61).

As the Deputy aided the Coast Guard in towing the boat off the shoals, he talked with a person on the Lady Barbara who told the Deputy he was very cold. The man on the boat said that he could not start the motors to warm up because they were "both stuck full of mud." He told the Deputy that one of the shafts had come loose from the motor and backed down as the boat was coming up the Pungo River; the boat had then drifted into Fortiscue Creek on the shoals. The Deputy concluded that the explanation was impossible because (1) the boat would have had to drift too far against the wind; (2) a shaft does not back out when a twin motor-shaft boat is running ahead up river; and (3) the motors would not pick up mud in the Pungo River, a part of the Inland Waterway. (R.pp. 61, 62). Deputy Carrowan

concluded that the boat must have entered the river before midnight, after which time he awakened when the wind shifted to the northwest; that wind shift blew the water out of Fortiscue Creek. (R.pp. 92, 103). He reasoned that a cargo vessel such as this would be in the creek, and came in the night before, only to bring in something. (R.p. 91).

A few days after the Lady Barbara incident, Deputy Carrowan went out in the creek wearing his fishing clothes and set his net. As he neared the Lombardo property, he stopped to light a cigarette and view the property. When he did so, two shots were fired at him from the Lombardo property by a high-powered rifle. Thereafter he restricted his surveillance to the road in and out of the Lombardo property. (R.pp. 63, 64).

After the Lady Barbara incident, the neighbors began to complain more frequently about the noises, saying they were being kept awake at night. Deputy Carrowan and his wife heard the boat noises and truck noises at their house, a half mile away. (R.pp. 60, 83). Mrs. Williams, a neighbor, told the Deputy about a tractor-trailer truck she had seen enter the Lombardo property on January 8. (R.pp. 8, 102). He confirmed the reports of truck traffic by tire tracks on the highway. (R.pp. 87, 88).

On January 13, 1979, Mrs. Williams notified Deputy Carrowan that a Ford truck with a camper body had entered the Lombardo property at 5:30 that afternoon. (R.pp. 88, 102). This was the first time he had a chance to observe a truck that had entered the property before it left. (R.p. 88). He waited for the truck and at midnight he saw a Ford truck with a camper body leave the Lombardo property. He noticed, as the truck exited, that the motor was turning at too high a rate of speed for low gear; it gave him the impression that it was loaded. (R.p. 68).

Coordinating Deputy Collins and Trooper Bass by radio with prearranged signals, Deputy Carrowan followed the truck and stopped it after several miles. (R.p. 70). He

approached the truck and asked Petitioner Trapper for his license. Although he expressed to Petitioner Trapper concerns about stolen furniture, he believed the truck had marijuana in it when he stopped Petitioner Trapper. (R.p. 79). When Deputy Carrowan asked to look in the camper for stolen furniture, Petitioner Trapper replied that he did not have a key to the camper. In response to his request, Petitioner Trapper gave Deputy Carrowan the registration card for the truck. Trooper Bass ran a check on the registration and returned the card to Deputy Carrowan. (R.p. 71). Trooper Bass then walked along the passenger side of the truck and reported to Deputy Carrowan that the truck was loaded with marijuana. Deputy Carrowan and Deputy Collins went to the same area of the truck and smelled the same odor. Petitioner Trapper was arrested and detained while Deputy Collins went to get a search warrant. (R.p. 72). Trooper Collins said that he detected the odor each of the four times he walked along the passenger side of the vehicle; it was coming from a vent. (R.p. 107).

The camper part of the truck was opened only after Deputy Collins returned with the search warrant. (R.p. 72). Twenty-five (25) bales of marijuana were found inside the camper. (R.p. 73).

Based on this discovery and other facts presented, a search warrant was issued for the Lombardo property. (R.pp. 75, 118). The warrant was served on Petitioner Nunzio Lombardo by Deputy Carrowan. The mobile home and adjacent warehouse were searched pursuant to the warrant. (R.p. 118). Petitioners Lorusso, Oldenbrook, Dennis Lombardo and Nunzio Lombardo were arrested during the search. The officers seized 511 bales of marijuana, lists and cash money in excess of $145,000.00. (R.p. 121).

Special Agent Young testified that he had participated in a drug raid in Pamlico County in 1976 at Messick. That raid had resulted in the discovery of between twenty-two (22) and twenty-five (25) tons of marijuana. The marijuana seized in that raid was wrapped or packaged very similar to that seized in this case. (R.p. 127).

REASONS FOR DENYING THE WRIT

Petitioners' request that their Petition for Writ of Certiorari be granted alleging that the application of the Fourth Amendment and the exclusionary rule by the North Carolina Court of Appeals in the case *sub judice* is inconsistent with prior decisions of this Court. The State of North Carolina believes that this Petition should be denied for the following reasons:

1. It is based on the transcript of the hearing by the trial court and not on the record on appeal which the appellate courts of North Carolina considered.

2. The decision of the North Carolina Court of Appeals is consisent with the most recent application of these legal principles to the issues presented. See *United States v. Cortez*, _____ U.S. _____ 100 S.Ct. 690, _____ L.Ed. 2d _____ (1981).

3. The facts which established probable cause to issue both search warrants were lawfully obtained and sufficient to establish probable cause.

1. The Petition for Writ of Certiorari is not based on the record on appeal which the appellate courts of North Carolina reviewed to decide the issues Petitioners present for review.

Before addressing this issue, the State would like to bring to this Court's attention one point which requires clarification. The Petition consistently refers to the North Carolina Court of Appeals, Second District. See cover page, *et seq.* The State of North Carolina has two appellate courts and thirty-three judicial districts wherein criminal matters are tried. North Carolina General Statutes Chapter 7A, Judicial Department. The case, *sub judice*, arose in the Second Judicial District. The decision of the trial court, the Hyde County Superior Court, on Petitioners' Motion to Suppress was reviewed by the two appellate courts. The decision of the North Carolina Court of Appeals has been

brought forward by the Petition for review. There is only one Court of Appeals in North Carolina and there is no appeallate court known as the North Carolina Court of Appeals, Second District. The Petitioner sought review by the Supreme Court of North Carolina which denied such review by granting a Motion to Dismiss filed by the State of North Carolina.

As the Petition recognizes, there were separate records of this case at the trial court and appellate court levels. The Petition uses the symbol "MST" to refer to the Motion to Suppress Transcript and "AR" to refer to the Appellate Record in the North Carolina Court of Appeals. See footnote 2, p. 4 of the Petition and footnote 3, p. 12. The Petitioners relied exclusively on the Motion to Suppress Transcript to prepare the Statement of the Case, to present the facts supporting the Reasons for Granting the Writ, and to present Excerpts from Motion to Suppress Transcript at pp. App. 28-App. 52 of the Petitioner.

The North Carolina Rules of Appellate Procedure limit the review of appeals of right from the trial courts solely to the record on appeal as constituted according to Rule 9 of said Rules (A.1).[2] At (b)(3) of Rule 9, the evidentary portion of the record on appeal in criminal action is limited to "so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned." The portion of Rule 9(c)(1) pertinent to the issue reads as follows:

> (c) Form — General Provisions
> (1) Evidence — How Set Out. Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonal evidence required to be included in the record on appeal by Rule 9(b) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. (A.-3).

[2]The symbol "A." refers to the Appendix attached hereto.

Rule 15 of the North Carolina Rules of Appellate Procedures at (f)(1) provide: "The record on appeal filed in the Court of Appeals by the parties constitutes the record on appeal for review by the Supreme Court." (A.-12). That rule controlled the record on appeal for the Petition for Discretionary Review filed by Petitioners with the Supreme Court of North Carolina.

The North Carolina record on appeal is distinguished from the "appeal on the original papers" approach in the Drafting Committee Note to Rule 9.

> While perhaps obvious, it may be worth emphasizing that although this Rule abandons the distinctive code terminology and some of its related technicalities for composing the record on appeal, it retains the two most fundamental features of the code approach: 1) use of authenticated copies of trial court record items (plus recorder's transcript), rather than the original trial court papers themselves; and 2) forced selection of items for inclusion in the record on appeal, rather than using the entire trial court record. This approach continues therefore to be fundamentally distinguished from the "appeal on original papers" approach now utilized in the federal and some state procedural systems, where the selection process occurs only in the items included in the appendix to the brief.
>
> North Carolina Rules of Appellate Procedure, pp. 20, 21. (A.-5, A.-6).

The North Carolina Supreme Court has held that the narration of evidence as specified in Rule 9(c) is mandatory. *Britt v. Allen* 291 N.C. 630, 231 S.E. 2d 607 (1976).

The State has requested that the clerk of the North Carolina Court of Appeals certify the record on appeal and transmit it to this Court. (A.-17).

In *Cicucci v. Illinois,* 356 U.S. 571 (1958), the Petitioner appended a number of newspaper articles regarding the trial. Neither the articles nor their subject matter was included in the record certified to this Court from the state supreme court. This Court held that the newspaper articles "not being part of the record, may not be considered here." *Ibid,* 573. Accordingly, the portions of Petitioners' brief taken from the Motion to Suppress Transcript are not a part of the record, were not considered by the state courts, and may not be considered here.

By excluding the inappropriate portions of the Petition, it is extremely difficult to ascertain the facts as reviewed by the North Carolina Court of Appeals. The record on appeal below was prepared by Petitioners' trial counsel including the counsel who prepared and submitted the Petition for Writ of Certiorari now under consideration. The Statement of Facts contains numerous quotations from the Motion to Suppress Transcript while the record on appeal is a narrative summation. It also contains facts which are not supported by the record on appeal considered by the State appellate courts. Thus, the Petitioners have so confused the facts before this Court with matters not a part of the record or considered by the state appellate courts, that the State of North Carolina believes this Court should deny the Petition under its authority as set out in Rule 21.5 of the Rules of the Supreme Court. As in *Erie R. R. v. Kirkendall,* 266 U.S. 195 (1924), the confused state of the record makes it difficult to ascertain the facts, if not impossible. The petition requesting relief fails "to give adequate information concerning the record and essential facts." *Ibid,* 185-186. The Petitioners have failed to accurately set forth the facts from the record on appeal considered by the State appellate courts thereby precluding a ready and adequate understanding of the points which require consideration as presented in the Petition.

2. The decision of the North Carolina Court of Appeals is consistent with the prior decisions of this Court and did not decide a federal question in a way which conflicts with the applicable decisions of this Court.

Since the decision of the North Carolina Court of Appeals was issued September 2, 1980, this Court has issued a decision which closely parallels the case *sub judice*. *United States v. Cortez, supra.* The State considers that case controlling and the decision of the North Carolina Court of Appeals to be consistent with that decision. The State believes that Petitioners have failed to establish that the decision of the North Carolina Court of Appeals conflicts with the applicable decisions of this Court.

a. The investigative stop of Petitioner Trapper's vehicle and the brief detention of Petitioner Trapper were permisible police actions under the Fourth Amendment.

During the past decade, this Court has issued several opinions which further refined the doctine first enunciated in *Terry v. Ohio,* 392 U.S. 1, (1968), i.e. there are certain special categories "of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make the Fourth Amendment 'seizures' reasonable could be replaced by a balancing test." *Dunaway v. New York,* 442 U.S. 200, 210 (1979). In an earlier case during the 1979 term, the Court firmly established that the initial stop of a vehicle and detaining its occupants constitutes a "seizure" within the meaning of the Fourth and Fourteenth Amendment, even though the purpose of the stop was limited and the resulting detention quite brief. *Delaware v. Prouse,* 440 U.S. 648 (1979).

In *Dunaway, supra,* 211, the Court cited *Prouse* as an extension of *Terry.* Thus, a brief stop of a vehicle to question the occupant does not require a showing of probable cause, but rather may be supported by articulable facts which make the officer reasonably suspect that the vehicle or its occupant are subject to seizure for violation of the law. *Prouse, supra.*

These holdings were succinctly summarized by Chief Justice Burger in *Cortez, supra,* ___, 100 S.Ct. at 694, 695:

> The Fourth Amendment applies to seizures of the person, including brief investigatory stops such as the stop of the vehicle here. *Reid v. Georgia,* ____ U.S. ____, ____, 100 S.Ct. 2752, 2753, 65 L.Ed.2d 890 (1980); *United States v. Brignoni-Ponce,* 422 U.S. *supra,* at 878, 95 S.Ct., at 2578; *Davis v. Mississippi,* 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969). *Terry v. Ohio,* 392 U.S. 1, 16-19, 88 S.Ct. 1868, 1877-1879, 20 L.Ed. 2d 889 (1968). An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. *Brown v. Texas,* 443 U.S. 47, 51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 541 (1979); *Delaware v. Prouse,* 440 U.S. 648, 661, 99 S.Ct. 1391, 1400, 59 L.Ed. 2d 660 (1979); *United States* v. *Brignoni-Ponce, supra,* 422 U.S. at 844, 95 S. Ct. at 2581; *Adams* v. *Williams,* 407 U.S. 143, 146-159, 92 S.Ct. 1921, 1923-1924, 32 L.Ed. 2d 612 (1972); *Terry v. Ohio, supra,* 392 U.S., at 16-19, 88 S.Ct., at 1877-1879.

Deputy Carrowan testified extensively as to his reasonable suspicion that this vehicle and its driver were involved in criminal activity. (R.pp. 58-103). The trial court's order set forth the facts which led to its conclusion that the deputy had probable cause to believe that the vehicle was being put to an unlawful use at the time he stopped it. (R.pp. 170-177). All the evidence indicated that this was not a random stop forbidden by *Prouse.*

The question presented by Petitioners now may be refined; whether the facts known to Deputy Carrowan and his analysis of those facts, based on his experience, gave him a particularized and objective basis for suspecting the person

stopped of criminal activity. As this Court held in *Cortez*, the totality of the circumstances must be taken into account in reviewing the detaining officer's decision.

> The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.
>
> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighted not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.
>
> The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in *Terry v. Ohio, supra,* said, "[t]his demand for specificity in the information upon which police action is predicated is *the central*

> *teaching of this Court's Fourth Amendment jurisprudence."* Id., 392 U.S., at 21, n. 18, 88 S.Ct., at 1880, n. 18 (emphasis added). See also, *Brown v. Texas, supra,* 443 U.S., at 51, 99 S.Ct., at 2640; *Delaware v. Prouse, supra,* at 661-663, 99 S.Ct. at 1400-1401; *United States v. Brignoni-Ponce, supra,* 422 U.S., at 884, 95 S.Ct., at 2581. *Ibid,* at ____, 100 S.Ct. 695.

In the present case, Deputy Carrowan testified that, at least two weeks prior to the stop of the vehicle operated by Petitioner Trapper, he had come to the conclusion that the Lombardo property was being used to smuggle marijuana. (R.pp. 81, 83). That conclusion was based on Deputy Carrowan's personal observations, information from his neighbors, consideration of the pattern of operation of drug smugglers in coastal areas, and activities inconsistent with the prior representations of Petitioner Nunzio Lombardo.

In the opinion below, the North Carolina Court of Appeals took judicial notice of the fact "that Hyde County is on the coast of North Carolina in an area which is regularly used by smugglers of marijuana." *State v. Trapper,* 48 N.C. App. 481, 486, 269 S.E. 2d 680, review denied, 301 N.C. 405, ____ S.E. 2d ____ (1980). The State requests that this Court take judicial notice of that fact. The pattern of behavior which characterizes such activities alerted Deputy Carrowan to that possibility as to the Lombardo property. The late night noises and truck traffic pointed to such a use and refuted the earlier representations that it was a hunting camp. The Lady Barbara's night grounding and physical characteristics plus the noticeable increase in traffic and night operations after its arrival pointed to a smuggling operation. The closely guarded privacy, evidenced by the locked gate and warning shots fired at the Deputy as he approached the property from the water, and Mr. Lombardo's failure to associate with local law enforcement officers, after holding himself out as a retired policeman, reinforced the conclusions that the property and its owner were not a hunting camp and a retired policeman. From these data and the other facts more

explicitly set forth in the Statement of the Case, this trained officer, particularly knowledgeable in water related activities, drew inferences and deductions which would lead those versed in the field of law enforcement in the coastal areas of North Carolina to the conclusion that the Lombardo property was being used to smuggle marijuana. The Messick case testified to by Special Agent Young was a well publicized case of a similar nature in a county with similar geography to Hyde, separated from Hyde County by a coastal sound. As this Court has so recently recognized, the process does not deal with hard certainties, but with probabilities.

The second element of the standard from *Cortez* was also met. If the marijuana was being delivered by boat, and trucks, including tractor-trailers, were departing the Lombardo property under cover of night; it was reasonable to conclude that these vehicles were being used to distribute the marijuana to other centers of distribution. The traffic at the Lombardo property had become unusually heavy after the Lady Barbara incident. (R.p.66). The vehicle in question departed the Lombardo property at midnight after arriving at 5:30 the same afternoon; it appeared to be loaded; and it had a New York license tag. (R.pp. 68, 6). These facts are far more indicative that the vehicle stopped was engaged in criminal activity than those facts shown in *Cortez*. Therefore, the stop of the vehicle was legal.

The Petitioners relied heavily on *Reid v. Georgia*, _____ U.S. _____, 100 S.Ct. 2752, in the Petition. The State believes that case is distinguished from the case *sub judice* by its facts. It was an airport stop of an individual based on the "drugs courier profile." Unlike the defendant in that case, the decision to make an investigative stop by Deputy Carrowan was based on much more than a brief view of Petitioner Trapper or a "hunch." The facts upon which the stop of Trapper was made do not allow officers to conduct "virtually randon seizures" of a very large category of presumably innocent travelers. The reliance on *Reid* offers no support for Petitioners' cause.

3. The facts which were offered to establish probable cause were sufficient for the judicial official to find probable cause and issue the warrants.

The portion of the Petition which concerns the search warrants addresses two issues: 1) whether the search warrants were supported by sufficient facts to remain valid should this Court strike the evidence obtained as a result of the stop of the Trapper vehicle and 2) an attempt to challenge the sufficiency of the factual basis upon which the warrants were issued. The State readily agrees with the Petitioners that the statements of probable cause upon which the warrants were issued will be insufficient to establish probable cause *if* the evidence obtained from the stop of the Trapper vehicle is suppressed.

On the second question, the State believes that the Petitioners have failed to make a showing sufficient to invoke the jurisdiction of this Court under 29 U.S.C. §1257(3). There was no showing made that the facts upon which the findings of probable cause were insufficient or in conflict with prior decisions of this Court.

As to the merits of Petitioners' contentions on this point, the State considers the argument to be based solely on just the sort of hypertechnical reading of the warrant this Court discussed in *United States v. Ventresca,* 380 U.S. 102 (1965). At footnote 5 on page 20 of the Petition, it is asserted that the statement of probable cause supporting the warrant to search the vehicle "fails to indicate that the odor was coming from the truck." The statement of probable cause reads as follows:

> a strong odor or [sic] marijuana was noticed as a license check was being made on the driver of said vehicle. Information was given in confidence from a very reliable informant, also (R.p.6, 116).

The warrant was issued to allow a search of both the truck and Petitioner Trapper. (R.p.6).

The statement of above when tested and interpreted in a commonsense and realistic fashion leads to one conclusion, the strong odor of marijuana was coming from the vehicle. As this Court noted in *Ventresca,* warrants should not be invalidated "by interpreting the affidavit in a hypertechnical, rather than a commonsense manner." *Ibid,* 109. Petitioners argue for just such a result. Federal courts and North Carolina courts have held that the odor of marijuana is sufficient to provide probable cause for a search warrant to be issued. *United States v. Kleinschmidt,* 596 F. 2d 133 (5th Cir.), *cert denied,* 444 U.S. 927 (1979); *United States v. Villarreal,* 565 F. 2d 932 (5th Cir.) *cert. denied* 439 U.S. (824) (1978); *State v. Barbee,* 34 N.C. App. 66, 237 S.E. 2d 352, (1977), *cert denied,* 435 U.S. 943 (1978); This Court noted in *Johnson v. United States,* 333 U.S. 10, 13, (1948):

> If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character.

A commonsense reading of the warrant shows that the judicial official had adequate facts upon which to make a finding of probable cause that the camper contained marijuana. The search warrant was issued upon sufficient facts to show probable cause which facts had been lawfully obtained. Accordingly, this contention by Petitioners fails to establish any conflict with prior decisions of this Court or to invoke their Court's jurisdiction under 28 U.S.C. §1257(3).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied with all costs being assessed against Petitioners.

Respectfully submitted,

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APPENDIX

RULE 9

THE RECORD ON APPEAL—FUNCTION, COMPOSITION, AND FORM

(a) **Function.** In appeals of right from the district courts and superior courts, review is solely upon the record on appeal constituted in accordance with this Rule 9.

(b) **Composition.**

(1) **In Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof: (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a copy of a stipulation of counsel showing the same; (iv) copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried; (v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given; (vii) copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law; (viii) a copy of the judgment, order, or other determination from which appeal is taken; (ix) a copy of the notice of appeal, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; (x) copies of all other papers filed and transcripts of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned, and (xi) exceptions and assignments of error set out in the manner provided in Rule 10.

(2) **In Appeals from Superior Court Review of Administrative Boards and Agencies.** The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a copy of a stipulation of counsel showing the same; (iv) copies of all petitions and other pleadings filed in the superior court; (v) a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken; (vi) copies of all items included in the record of administrative proceedings which were filed in the superior court for review; (vii) so much of the evidence taken before the board or agency and in the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (viii) a copy of the notice of appeal from the superior court, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; and (ix) exceptions and assignments of error to the actions of the superior court, set out as provided in Rule 10.

(3) **In Criminal Actions.** The record on appeal in criminal actions shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court; (iv) copies of docket entries or of a stipulation of counsel showing all

arraignments and pleas; (v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given; (vii) copies of the verdict and of the judgment, order, or other determination from which appeal is taken; (viii) a copy of the notice of appeal, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; (ix) copies of all other papers filed and proceedings had in the trial courts which are necessary for an understanding of all errors assigned, and (x) exceptions and assignments of error set out as provided in Rule 10.

(4) **Order of Arrangement.** The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(5) **Inclusion of Unnecessary Matter; Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(6) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative the appellate court may order additional portions of a trial court record sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal amended to correct error shown as to form or content.

(c) **Form — General Provisions.**

(1) **Evidence — How Set Out.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(b)

shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form.

Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) **Exhibits.** (i) Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by stipulation of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(ii) Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed as part of the record on appeal. When an original exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the court to which appeal is taken. The clerk shall thereupon promtly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appeallate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the record on appeal.

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered.

(4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively. At the end shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 1-282, Sup. Ct. (and Ct. App.) Rules 19, 20, 21, 22, 23, 26.

Commentary:

General. This Rule , in subdivision (b), contains a fundamentally new approach to prescribing the compositon of the record on appeal. The traditional formula of the code and implementing rules of a "record proper," supplemented where required by a "settled case on appeal," is here abandoned in favor of a detailed enumeration of required items for each of the three types of cases which can be appealed from the trial courts to the appellate courts: civil actions, subd. (b)(1); criminal actions, subd. (b)(3); and appeals from superior court administrative agency reviews, subd. (b)(2). Over the years the practice had already essentially moved around the theoretical code design, as the exact composition of the "record proper" became less and less clear. The device of a specific listing of items is designed to make more certain the process of composing the record on appeal and so to reduce some of the confusion clearly indicated in records and court discussions of imperfectly composed records arising to some extent from the code terminology and its related procedures.

While perhaps obvious, it may be worth emphasizing that although this Rule abandons the distinctive code terminology and some of its related technicalities for composing the record on appeal,it retains the two most fundamental features of the code approach: 1) use of authenticated copies of trial court record items (plus reporter's transcript), rather than the original trial court papers themselves; and 2) a forced selection of items for inclusion in the record on appeal, rather than using the entire trial court record. This approach continues therefore to be fundamentally distinguished from the "appeal on the original papers" approach now

ulitized in the federal and some state procedural systems, where the selection process occurs only in the items included in the appendix to the brief. The selection process under this Rule is dictated with respect to enumerated items which may or may not be relevant from case to case, such as jury instructions and other elements of the trial process, by those provisions which admonish inclusion only "when necessary to understand errors assigned." It is in this way that the case-by-case flexibility of composition of the code's "settled case" is carried forward. Counsel should be alert to one fundamental change which this approach involves. Formerly, if appeal could be prosecuted on the "record proper," appellant need not either obtain agreement of appellee nor make service upon him of a "statement of case on appeal," but could merely have the clerk certify the items constituting the "record proper," and docket this as the complete "record on appeal" in the appellate court. See, e.g., *Edwards v. Edwards*, 261 N.C. 445 (1964) (appeal from judgment on the pleadings). Under the new rule, even in such a case he must either obtain agreement of counsel to these items as the "record on appeal" under Rule 11(a), or serve them upon him in a "proposed record on appeal" for acceptance under Rule 11(b) or judicial settlement under Rule 11(c).

While the Rule requires routine inclusion in the record on appeal of all those items which clearly would have been considered parts of the "record proper" under the code (e.g. items iii, iv, vii, viii of subd. (b)(1) for civil appeals), it should be noted that Rule 12(c) provides that even these items may be excluded from those work copies of the formal record on appeal actually prepared by the appellate court clerk for direct consideration by the members of his court. This lays the basis for a two-stage selection process which if carefully followed will produce: 1) an original record on appeal, available for inspection by the court, which is broad enough in scope to allow fair consideration in relevant context of all errors properly to be considered; but (2) "work" copies for individual members of the courts from which have been excluded any formally required items in the original record (such as pleadings, jurisdictional statements or papers) which are not relevant to consideration of particular errors assigned by the parties. Cf. former Sup. Ct. R. 22 and see Commentary to Rule 12(c).

Subdivision (b)(1)-(3). While most of the items enumerated for inclusion in the original records on appeal in these three catagories of cases are self-explanatory, it may be helpful to relate some to practice under former statutes and rules.

Item (ii) in subsections (1), (2), (3): "a statement identifying the judge, etc." This is designed to perform the function of the "organization of the court" item indirectly required by former Sup. Ct. R. 22, and traditionally included by counsel in widely varying form in the original record on appeal. The office of this item is simply to permit routine confirmation by the appellate court of the subject matter jurisdiction or "competence" of

the particular trial judge and tribunal, whether or not any jurisdictional question has been directly raised by the parties on appeal. See N.C.R.Civ. P.(12)(h)(3) (lack of subject matter jurisdiction may be noted by court at any stage of proceedings). The elements enumerated are sufficient for this purpose when rounded out by the court's range of judicial notice. If peripheral questions of "organization" such as the composition of grand or petit jury are to be drawn in question, this should be done by specific assignment of error with relevant parts of the record specially included.

Item (iii) in subsections (1) and (2), "a copy of the summons, etc.". This is designed to provide a record showing of the existence of "judicial" jurisdiction of the trial tribunal, whether personal over the defendant, in rem or quasi in rem, and however based and exercised. Under Code practice it had consistently been understood that the *summons* constituted a part of the "record proper," so must be included in the original record on appeal. *Cressler v. City of Asheville*, 138 N.C. 482 (1905) ("summons, pleading and judgment"). And Sup. Ct. R. 22 built indirectly upon this by providing that the summons so included need not be included in the "printed" copies prepared by the Clerk. Both of these prescriptions, framed in an earlier day of simple process and jurisdiction rules, were too narrowly confined in terms, seemingly only to cases where personal jurisdiction has been acquired by personal service of process. This new Rule speaks more contemporaneously and accurately to the underlying necessity, which is for a record showing of "judicial" jurisdiction, whether over person or property, and whether acquired by service of summons, publication, notice, appearance, waiver, or however.

Item (ix) in subsection (1); (viii) in subsections (2) and (3), "a copy of the notice of appeal, etc.". This carries forward existing practice, not formerly required by statute or rule but by judicial decison, e.g., *Atkinson v. Asheville St. Ry.*, 113 N.C. 582 (1893), of including in the record on appeal a showing of appeal properly taken and perfected. This establishes as a matter of record the jurisdiction of the *appellate court* in the particular case. The way in which this has traditionally been shown is by the standardized "appeal entries" which show appeal taken orally "in open court," "further notice waived" (unnecessary), accompanied by any judicial extensions of the statutory times for serving "case" and "counter case," and the amount of appeal bond. This may certainly be continued under this Rule, but the Rule would also be complied with by inclusion of a copy of a written notice of appeal with proof of service under Rule 3(a)(2), or 3(b) and with separate showing of any judicial orders extending times for perfecting appeal. See Committee Form 5, "Appeal Entries."

Subdivision (b)(4). Self-explanatory. Cf. former Sup. Ct. R. 19(1).

Subdivision (b)(5). Former Sup. Ct. R. 26 provided for recovery of the costs of printing records and briefs by the party prevailing, but limited recovery on a maximum page/maximum per page cost basis. This operated indirectly, and in experience not too successfully, as a deterrent to inclusion in the record on appeal of uncessary matter. Former Sup. Ct. RR. 26 and 19(5) also provided a more direct sanction of costs against the party responsible for the inclusion of unnecessary matter in the record on appeal, without regard to outcome of the appeal. This sanction had apparently seldom been invoked. This subdivision of the new rule abandons the page/cost per page limitations on recovery of printing costs by a prevailing party, and retains the sanction of imposing costs of unnecessary portions on the offending party. It has two new features: 1) the sanction is not dependent upon an opposing party's objection, but may be imposed by the court on its own initiative; 2) the costs are chargeable directly against *counsel* as well as a party in the court's discretion.

Subdivision (b)(6). Self-explanatory. Cf. former Sup. Ct. R. 19(1).

Subdivision (c)(1). The problem of incorporating evidence in the record on appeal has two aspects: 1) determining that portion of the total received (or offered) to be included, and 2) the mode of setting out *testimonial* evidence. This subdivision addresses the latter aspect.

The best possible incorporation of testimonial evidence in a record on appeal would 1) include no more than is minimally required for reviewing errors assigned; 2) set out in narrative summary form that which merely lays an undisputed factual context or provides an undisputed factual background; and 3) set out in question-and-answer form all that wherein shades of meaning, nuances of expression, and ambiguity of question or response bear obviously upon the sense and credibility of testimony. An all-narrative summary undoubtedly obscures the true sense of much critical testimony, tends to encourage inclusion of unnecessary portions, and is exceedingly time-consuming. An all-verbatim transcript inevitably includes long passages of confused questions and answers frequently leading finally to the establishment of purely peripheral fact which, though necessary as context or background, is not really disputed and could be compressed fairly into summary form. Generally speaking, it is obvious that a narrative form is easier for the reviewing court to use, while a verbatim question-and-answer form is easier for counsel to prepare. The problem has been and remains one of accommodation to these conflicting interests and values. This subdivision attempts a new accommodation. Its first sentence continues, for obvious reasons, the traditional requirement that evidence whose admission or exclusion is assigned as error be included in

question-and-answer form. The rest of the subdivision involves a limited relaxation of the former flat requirement of narrative form for all other testimonial evidence included. The idea expressed is that this remains the ordinarily preferred and required form, but with the option given to use question-and-answer form where the narrative would obscure particular testimony's true sense. With this option given, it may inevitably become the object of disagreement between counsel during the process of composing the record on appeal. To aid both counsel and any judge required to settle such a dispute as to form, the last paragraph of this subdivision is devoted to a general statement of the considerations properly to be used in determining the fitness of the particular mode in dispute. These are to be brought into play in the normal process, set out in Rule 11, of settling the record—whether by agreement, acceptance through adversarial exchange, or judicial settlement. In this process the appellant will obviously have the first opportunity to choose the form or forms to be used (after having first selected those portions of the total evidence which are to be included in any form). This choice might be exercised informally in a proposal to the appellee for an agreed record on appeal, or in a formal "proposed record on appeal" served upon the appellee. In the later situation an appellee might either formally object to the proposed form, or include a different form in his "proposed alternative record on appeal." In either case, judicial settlement as to the propriety of the disputed form would then be forced.

Subdivision (c)(2) deals in its two subsections with two different kinds of exhibits which may be required items in the record on appeal. Subsection (i) deals with documentary exhibits (which ordinarily will not have been introduced in evidence) which are attached to or are parts of items required to be included in the record on appeal under Rule 9(b) (such as pleadings). On motion these may be excluded as unnecessary to the appeal from the item of which they are a part or to which they are attached, though the item itself must be included in the record on appeal. Subsection (ii) deals with evidentiary exhibits, both documentary and other, which are required items in the record on appeal. If documentary, three copies must be filed with the record. If not documentary only the original, for obvious reasons, need be filed. To protect clerks in their custodial responsibility against the possible loss or damage to such exhibits, G.S. § 7A-106, the rule provides that these may be transmitted directly by the clerk to his appellate court counterpart without relinquishing their custody to counsel.

Subdivision (c)(3). Self-explanatory. From former Sup. Ct. R. 19(1)

Subdivision (c)(4). Self-explantory. From former Sup. Ct. R. 19(1).

RULE 15

DISCRETIONARY REVIEW ON CERTIFICATION BY SUPREME COURT UNDER G.S. § 7A-31

(a) **Petition of Party.** Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any of the grounds specified in G.S. § 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the Utilities Commission, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under G.S. Chap. 15, Art. 22.

(b) **Same; Filing and Service.** A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

(c) **Same; Content.** The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. §7A-31 for discretionary review. The petition shall be accompanied by a copy of the Court of Appeals when filed after determination by that court. No supporting brief is required; but supporting authorities may be set forth briefly in the petition.

(d) **Response.** A response to the petition may be filed by any other party within 10 days after service of the petition upon him. No supporting brief is required, but supporting authorities may be set forth briefly in the response.

(e) **Certification by Supreme Court; How Determined and Ordered.**

(1) **On Petition of a Party.** The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) **On Initiative of the Court.** The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to G.S. § 7A-31 is made without prior notice to the parties and without oral argument.

(3) **Orders: Filing and Service.** Any determination to certify for review and any determination not to certify made in response to petition will be recorded by the Supreme Court in a written order. The Clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the Clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the Clerk of the Supreme Court.

(f) **Record on Appeal.**

(1) Composition. The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Filing; Copies.** When an order of certification is filed with the Clerk of the Court of Appeals, he will forthwith transmit the orginal record on appeal to the Clerk of the Supreme Court. The Clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the Clerk may require a deposit of the petitioner, to cover the costs thereof.

(g) **Filing and service of Briefs.**

(1) **Cases Certified Before Determination By Court of Appeals.** When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed his brief in the Court of Appeals and served copies before the case is certified, the Clerk of the Court of Appeals shall forthwith transmit to the Clerk of the Supreme Court the original brief and any copies already reproduced by him for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed his brief in the Court of Appeals and served copies before the case is certified, he shall file his brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) **Cases Certified for Review of Court of Appeals Determinations.** When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared inconformity with Rule 28 in the Supreme Court and serve copies upon all other

parties within 20 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 20 days after a copy of appellant's brief is served upon him.

(3) **Copies.** A party need file or the Clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The Clerk of the Supreme Court will thereupon procure from the Court of Appeals or will himself reproduce copies for distribution as directed by the Supreme Court. The Clerk may require a deposit of any party to cover the costs of reproducing copies of his brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(4) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the court's own initiative. If an appellee fails to file and serve his brief within the time allowed by this Rule 15, he may not be hear in oral argument except by permission of the Court.

(h) **Discretionary Review of Interlocutory Orders.** An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by that Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) **Appellant, Appellee Defined.** As used in this Rule 15, the terms *appellant* and *appellee* have the following meanings:

(1) With respect to Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, *appellant* means a party who appealed from the trial tribunal; *appellee*, a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals upon the Court's own initiative, *appellant* means the party aggrieved by the determination of the Court of Appeals; *appellee*, the opposing party. Provided, that in its order of certification, the Supreme Court may designate either party *appellant* or *appellee* for purpose of proceeding under this Rule 15.

Drafting Committee Note

Sources and parallels in former rules and statutes: Supp. Rules 1, 2, 4, 5, 6, 8, 11, 13.

Commentary:

General. For coverage of this rule in conjunction with that of App. R. 14, see General Commentary to the latter. Not that this Rule 15 deliberately avoids use of the term "certiorari" to describe the procedure by which under the jurisdictional statute, G.S. § 7A-31, the Supreme Court exercises its discretionary power to review cases originally docketed for review in the Court of Appeals. Instead, the terms "certification," "certify for review" "petition for discretionary review," are used to conform directly to the statutory language and the procedure therein described, and to distinguish this procedure from that for review by the extraodinary writ of certiorari, which is dealt with in App. R. 21.

Subdivision (a) lays the basis for the rule's coverage of both by-pass and post-determination review procedures.

Subdivision (b) carries forward the time limits for petition for discretionary review provided in former Supp.R. 1 (by-pass) and Supp. R. 22 (post-determination). For commentary on the provision for tolling by filing a petition for rehearing in the Court of Appeals and the reciprocal effect of waiver of rehearing by petition for discretionary review, see Commentary to App. R. 14(a).

Subdivision (c). The provision for accompanying a post-determination petition with a copy of the Court of Appeals' opinion is from former Supp.

R. 5(b). The other provisions supplant and serve the function of those provisions of former Supp. Rules 1 and 2 which borrowed certiorari writ practice by reference to former Sup. Ct. R. 34.

Note that the rule requires only that the petition contain a statement of the jurisdictional basis (in fact and law) for the review being sought. It is *not* necessary in the petition to specify the whole range of questions which the petitioner is entitled to present and intends to present if the case is certified for review. That is the office of the new brief required by subdivision (g)(2) of this rule to be filed upon certification. By Rule 16(a) the scope of Supreme Court review is not limited to "those questions upon whose existence . . . the discretionary review is based," but extends to all questions then "property presented in the new briefs."

See, for an illustrative form of a petition for discretionary review under this Rule, Committee Form 4.

Subdivision (d). Former Supp. Rules 1 and 2 in effect borrowed the certiorari *writ* practice sketched in former Sup. Ct. R. 34 for the discretionary review practice which is the subject of this new Rule 15. One of the former rule's features was a provision for response by other parties to such a petition. This subdivision carries this forward by direct statement.

Subdivision (e). Subsections (1) and (2) state directly what was merely implicit in former Supplementary Rules, which did not speak directly to the decision process on petitions for discretionary review. Subsection (3) carries forward, unchanged i substance but with some elaboration, the provision of former Supp. Rules 6, 8, and 13.

Subdivision (f). Subsection (1), first sentence, carries forward, unchanged in substance, the provisions of former Supp. r. 5(a). The second sentence is new. See Commentary to comparable App. R. 14(c)(1).

Subsection (2) conforms to developed clerical practice not directly stated in former Supplementary Rules. See Commentary to App. R. 14(c)(2).

Subdivision (g). Subsection (1) carries forward, unchanged in substance, the provisions of former Supp. RR. 6 and 11 controlling the filing and service of briefs in "by-pass" review situations whether on party or court initiative.

Subsection (2) carries forward the essential provisions of former Supp. RR. 7 and 8 controlling the filing and service of briefs in cases involving review by the Supreme Court of Court of Appeals determinations, but with two significant alterations from former practice: 1) The timetable for filing and service is changed; as to the appellee's brief, from 20 days after docketing in the Supreme Court to 15 days after service of appellant's brief.

2) The option to file *supplementary* briefs is removed; filing of *new* briefs is required. See Commentary to App. R. 14(d)(1).

Subsection (3) covers the filing of briefs in both by-pass and post-determination review cases. In by-pass review situations the responsibility for filing in the Supreme Court will depend upon whether the party has already filed his brief in the Court of Appeals before the case is certified for review. App. R. 15(g)(1). In post-determination situations filing will always be by the party and will be of the *new* brief required by App. R. 15(g)(2). This subdivision (3) is simply saying that in whatever situation only one copy of that brief need be filed in the Supreme Court to satisfy the *filing* requirement.

Subsection (4) carries forward, unchanged in substance, a comparable provision in Sup. Ct. RR. 28 and 29.

Subdivision (h) carries forward the comparable provision in former Supp. R. 2, and is dawn ultimately from G.S. § 7A-31.

Subdivision (i). From former Supp. R. 4.

RUFUS L. EDMISTEN
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P. O. Box 629
RALEIGH
27602

20 March 1981

Honorable Francis E. Dail
Clerk
Court of Appeals of North Carolina
P. O. Box 2779
Raleigh, North Carolina 27602

RE: State v. Trapper, et al
NO. 7928SC1188

Dear Frank:

Attached please find a copy of a letter, dated March 3, 1981, from the Honorable Alexander L. Stevas, Clerk to the Supreme Court of the United States. In that letter, this office was requested by the Court to respond to the petition for writ of certiorari filed in that Court, on January 13, 1981, by the defendants below requesting that Court to review the order of the Court of Appeals of North Carolina in the above-referenced case.

Pursuant to Rule 19.1 of the Rules of the Supreme Court of the United States, the respondent, the State of North Carolina, hereby requests that you certify and transmit to the Supreme Court of the United States the record in State v. Trapper, et al. The respondent considers the record essential to a proper understanding of the case in the brief in opposition by the Supreme Court.

Thank you for your assistance in this matter.

Sincerely,

RUFUS L. EDMISTEN
Attorney General

Daniel F. McLawhorn
Assistant Attorney General

DFMcL/dw
cc: The Honorable Alexander L. Stevas
Joel Hirschhorn, Esq.